




2013

Toward a Common Law of Plea Bargaining

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Recommended Citation

Oliver, Wesley MacNeil (2013) "Toward a Common Law of Plea Bargaining," *Kentucky Law Journal*: Vol. 102 : Iss. 1 , Article 4.
Available at: <https://uknowledge.uky.edu/klj/vol102/iss1/4>

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Kentucky Law Journal

VOLUME 102

2013 – 2014

NUMBER 1

ARTICLES

Toward a Common Law of Plea Bargaining

Wesley MacNeil Oliver¹

PLEA bargaining has been quite accurately described as “an informal, administrative, inquisitorial process of adjudication.”² Those who brag of the superiority of the American criminal justice system often praise its adversarial, as opposed to inquisitorial, nature.³ Yet for approximately ninety-five percent of all defendants, the prosecutor is, for all practical purposes, the only judge they will encounter.⁴ The prosecutor-judges who resolve these cases do so without necessarily referring to how any other case was resolved and do not follow any particular procedure, formal or informal, in deciding how to make offers.⁵ Their decisions are not subject to review and largely avoid public scrutiny.⁶ Defense lawyers, in part for reasons of their own making, are ill equipped for whatever idiosyncratic process a particular prosecutor’s office

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2 Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1404 (2003).

3 While championing the unique superiority of America’s criminal justice system has long provided an applause line in political speeches, opinions of the United States Supreme Court have now similarly taken to touting its virtue. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (observing, with no small degree of contempt for European practice, that contrary to the “continental civil law,” the “common-law tradition is one of live testimony in court subject to adversarial testing”); *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) (boasting this country’s “preference for an accusatorial rather than an inquisitorial system of criminal justice”).

4 *See Padilla v. Kentucky*, 559 U.S. 356, 372–73 (2010) (describing statistics). For an historical account of the transition of the American prosecutor from a relatively unimportant officeholder to one with almost limitless power, see John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 8–9 (John L. Worrall & M. Elaine Nugent–Borakove eds., 2008).

5 *See Stephanos Bibas, The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 373 (2010) (observing that prosecutorial discretion is exercised in a way that “is very often ad hoc, hidden, and insulated from public scrutiny and criticism”).

6 *Id.*

has developed for considering the defendant's perspective.⁷ As one critic of the American inquisitorial system has noted, our plea driven practice lacks the attributes of the rule of law.⁸

There has been considerable disagreement in the legal community about the impact the Supreme Court's recent decisions in *Missouri v. Frye*⁹ and *Lafler v. Cooper*¹⁰ will have on this currently unregulated system of adjudicating criminal cases.¹¹ In this Article, I argue that the long-term impact of these decisions could cause judges and defense lawyers to reconsider their roles. These decisions have the potential to address one of the most troublesome problems in the criminal justice system—sentencing. From a macro-perspective, the problem is inconsistent sentencing, but the problem from the individual's perspective is that some defendants are receiving excessive sentences. *Lafler* and *Frye* have the potential to address two of the causes of this phenomenon: underperforming defense counsel and overzealous prosecutors. These decisions create the potential for improving the performance of defense lawyers in negotiations and may help inject criteria and transparency into the previously unregulated world of prosecutorial discretion.

The opinions themselves broke new ground because they were the Supreme Court's first recognition of the right to an effective plea bargainer and may assume a place among the most important right-to-counsel decisions. There has never been any doubt that the Constitution ensured the right of a defendant to hire a lawyer for trial. With *Gideon v. Wainwright*,¹² the Court recognized that a defendant had a right to appointed counsel if he could not afford one,

7 To remedy this problem, Ron Wright and Ralph Peeples have suggested that defense lawyers should now be evaluated by comparing the deals they cut compared to other lawyers in that jurisdiction and that this information should be used to train defense lawyers. See Ronald F. Wright & Ralph A. Peeples, *Criminal Defense Lawyer Moneyball: A Demonstration Project*, 70 WASH. & LEE L. REV. 1221 (2013).

8 See William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law*, (Nov. 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=854284.

9 *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

10 *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

11 Luminaries in the area of criminal procedure have concluded that the decisions will have little impact. See, e.g., Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39 (June 12, 2012), <http://yalelawjournal.org/images/pdfs/1097.pdf>; Craig M. Bradley, *Effective Counsel for Plea Bargains*, TRIAL, June 2012, at 56, 58 (specifically challenging commentators quoted in the *Times*). Others conclude that these are groundbreaking decisions. See Stephanos Bibas, *Taming Negotiated Justice*, 122 YALE L.J. ONLINE 35, 35 (June 20, 2012) ("Finally, the Supreme Court has brought law to the shadowy plea-bargaining bazaar."), <http://www.yalelawjournal.org/images/pdfs/1096.pdf>; Cara H. Drinan, *Lafler and Frye: Good News for Public Defense Litigation*, 25 FED. SENT'G. REP. 138, 138 (2012) (suggesting that *Lafler* and *Frye* signal a retreat from formalistic reliance on separation of powers that has thwarted the success of litigation seeking better compensation for indigent defense).

12 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

and with *Strickland v. Washington*,¹³ the Court held that the Constitution entitled a defendant to effective representation. Until *Lafler* and *Frye*, however, the Court had not recognized that a defendant could suffer prejudice from his attorney's poor performance in the course of a negotiation.¹⁴ The absence of any constitutional requirement that defense counsel effectively negotiate was substantial, since the overwhelming percentage of convictions in this country are obtained through a plea bargain—ninety-seven percent in federal court and ninety-four percent in state court.¹⁵ Statistically, the right to counsel is the most critical in the negotiation phase. Fifty years ago, the Supreme Court extended the right to counsel to indigents, who comprise the bulk of criminal defendants.¹⁶ In *Lafler* and *Frye*, the Court extended the right to counsel to the plea bargaining process, the phase of the trial that determines the outcome for the bulk of criminal defendants.¹⁷

13 *Strickland v. Washington*, 46 U.S. 668 (1984).

14 In *Hill v. Lockhart*, 474 U.S. 52, 60 (1985), the Court found that a defendant who received a thirty-five year sentence under a plea agreement could not show that he was prejudiced by his counsel's incorrect description of his parole eligibility. Because the defendant had a prior felony, of which neither the prosecution nor defense was aware, he was eligible for release after serving half of his sentence, not one third as both the prosecution and defense assumed. *Id.* The Court concluded that there had been no ineffective representation because the defendant would have been required to serve half of whatever sentence he received at trial, not the third that lawyers for each side assumed during their negotiations, and the defendant's sentence was discounted by the percentage he believed when he entered into the plea. *Id.* He got the benefit he bargained for; his exposure was simply higher than his attorney or the prosecutor assumed. *Id.* Of course, this lack of knowledge by defense counsel could well have prejudiced the defendant. If the prosecutor was willing to accept a sentence of thirty-five years with release eligibility after a third of that time, he may have been willing to accept a shorter sentence if he had known the defendant was not eligible for release until half the sentence was served.

The prejudice standard in *Hill* effectively precluded the claims the Court accepted in *Lafler* and *Frye*. In *Hill*, the Court concluded that defense counsel's failure to be aware of his client's actual release date for the crime to which he pled would be relevant only if this information would have caused his client to reject the plea and go to trial. *Hill*, 474 U.S. at 60. The Court's standard said nothing about the possibility of this new information providing a basis for an argument in the negotiation.

In *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010), the Court recognized that a defense lawyer's knowledge of a proposed plea bargain's immigration consequences is important because it informs the negotiation strategy, something the Court did not consider as a possibility in *Hill*. As Justice Stevens observed, a prosecutor may be amenable to a package that avoids deportation, something defense counsel's failure to understand the deportation consequences prevented him from exploring with the prosecuting attorney. *Id.*

15 *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012); see Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1620 (2005) (observing the imperfect monitoring of prosecutors by the public, particularly in cases that are not high profile).

16 *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963).

17 *Lafler*, 132 S. Ct. at 1384; *Frye*, 132 S. Ct. at 1405.

The facts of *Lafler* and *Frye* were not complicated. In *Frye*, defense counsel failed to communicate an offer to his client before it expired.¹⁸ In *Lafler*, defense counsel incorrectly believed that a shot below the waist was insufficient to demonstrate intent to kill and advised his client to reject a plea offer to the crime of assault with the intent to kill.¹⁹ These cases were not about whether the lawyers performed adequately during the negotiation phase. The state authorities defending the convictions in *Lafler* and *Frye* did not claim that either lawyer had behaved reasonably. Instead, the lawyers for the states of Michigan and Missouri argued that there was no constitutional right to the effective assistance of counsel during the plea bargaining process.²⁰ The Court rejected their arguments, recognizing the central role plea bargaining plays in the modern world.²¹ Quoting Dean Robert Scott and the late Professor William Stuntz, the Court observed that “plea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system.”²²

Prior to *Lafler* and *Frye*, the Supreme Court regarded plea offers to be a matter of prosecutorial largesse, severely limiting defense counsel’s Sixth Amendment obligations in negotiations. Before these decisions, defense counsel were found to be ineffective during plea negotiations only when they recommended that their clients accept a plea even though there was a reasonable probability that their client would have been acquitted on some or all of the charges.²³ While some lower courts had recognized that defense counsel had a broader constitutional obligation to their clients during plea bargaining,²⁴ the Supreme Court’s doctrines had placed no obligation on defense counsel during the negotiation phase aside from evaluating the possibility of prevailing at trial.

Surely few convictions will be overturned because defense counsel was so deficient that it failed to function as counsel during the negotiation process.²⁵ But recognizing that counsel’s role in the negotiation phase is as important as it is in the trial phase may well change the ethos of defense lawyers and

¹⁸ *Frye*, 132 S. Ct. at 1404–05.

¹⁹ *Lafler*, 132 S. Ct. at 1383.

²⁰ See Brief for the Petitioner at 12–23, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (No. 10–209), 2011 WL 1523284; Brief for the Petitioner at 15–32, *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (No. 10–444), 2011 WL 1593613.

²¹ *Frye*, 132 S. Ct. at 1407; *Lafler*, 132 S. Ct. at 1388.

²² *Frye*, 132 S. Ct. at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

²³ See *Hill v. Lockhart*, 474 U.S. 52, 60 (1985).

²⁴ See David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1547–53 (2011).

²⁵ *Strickland v. Washington*, 466 U.S. 668, 687 (1984) permits a finding of ineffective assistance of counsel only if counsel was “not performing as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* A number of commentators have observed that few cases will be overturned because of the *Lafler* and *Frye* decisions. See, e.g., Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 152 (2012); Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39, 42 (2012), <http://yalelawjournal.org/images/pdfs/1097.pdf>.

those who train them. Trial lawyers have long served as the role models for great defense lawyers. Lawyers honing their skills to be like their idols have sought to improve the skills that made their mentors famous—their persuasive opening and closing arguments, their tight cross-examinations.²⁶ Continuing legal education courses for criminal lawyers have focused on trial and appellate skills.²⁷ Law schools have similarly reinforced the view that the most important skills a criminal lawyer can possess are those used in the courtroom. Negotiation courses have been taught at law schools for decades, but plea bargaining classes are all but unknown.²⁸

Lafler and *Frye* will be important in changing the internal and external perceptions of criminal defense lawyers. It is significant that the Supreme Court, rather than just a lower court, announced the right to an effective negotiator. Law professors are reluctant to teach anything unless the Court has addressed the issue, regardless of how important the issue may be to actual clients.²⁹ *Lafler* and *Frye* will make it difficult to continue to ignore plea bargaining in the law school curriculum. Defense lawyers and those who train them will come to see the need for studying plea bargaining techniques as equally important to the need for practicing litigation skills for trials and appeals.

The visibility of these Supreme Court decisions puts them on defendants' radar in a way that lower court's decisions could not. The decision of an intermediate appellate court does not get the publicity of a Supreme Court opinion. Lawyers will thus be more aware of these decisions, but so will their former clients. This means that defendants in post-conviction proceedings, who typically lack access to counsel, are thus much more likely to raise claims for ineffective assistance of counsel in the negotiation phase in *pro se* filings.

Lafler and *Frye* may, however, have an even more profound effect, not because of what the Court did in these cases, but because of what it did not do. While the Court recognized there was a right to effective assistance in the plea bargaining process, it did not identify the appropriate remedy for the violation.³⁰ The Court rejected as too rigid the two remedies used by lower courts finding ineffective assistance in the plea bargaining process.³¹ These courts had either ordered new trials or ordered prosecutors to re-offer the offers that were rejected on the

26 See discussion *infra* Part I.A.

27 See discussion *infra* Part I.B.

28 Bobbi McAdoo et al., *It's Time to Get It Right: Problem-Solving in the First-Year Curriculum*, 39 WASH. U. J.L. & POL'Y, 2012, at 39, 49 (noting dramatic increase in the number of negotiation classes). Recently, the law schools at the University of Virginia and American University have started teaching courses on negotiation. By contrast, most law schools in this country teach courses on negotiation and/or alternative dispute resolution.

29 See discussion *infra* Part I.E.

30 *Lafler v. Cooper*, 132 S. Ct. 1376, 1388–91 (2012) (remanding to determine appropriate remedy); *Missouri v. Frye*, 132 S. Ct. 1399, 1411 (2012) (remanding to determine whether defendant would have accepted plea and whether prosecutor would not have withdrawn it).

31 *Lafler*, 132 S. Ct. at 1388–90.

basis of bad advice.³² *Lafler* and *Frye* established that lower courts were not limited to these two options. The Court held that if constitutionally ineffective counsel causes a plea to be rejected, the remedy, in the judge's discretion, lies somewhere between the penalty offered in the rejected plea and the punishment the defendant actually received.³³ The Court specifically observed that in the exercise of their equitable discretion, lower courts could find that defendants rejected plea bargains on the basis of advice rising to the level of ineffective assistance of counsel, and yet provide no remedy at all.³⁴ To understand how to exercise this vast discretion, lower courts seemingly must look to guidance the Supreme Court has previously provided in ineffective assistance of counsel cases. If their remedial powers are consistent with the limits on their ability to sustain claims of ineffective assistance of counsel generally, then these courts must now fashion remedies that ensure defendants receive the "fair" portion of the plea offer they would have received were it not for their lawyers' errors.

In crafting this remedy, courts should look to the reasons prosecutors offer plea bargains. Some pleas are driven by the prosecutor's sense that the outcome achieves a just result, others are driven by the prosecutor's risk-aversion, efforts to preserve judicial resources, or receipt of cooperation from the defendant. Most are driven by some combination of those factors.³⁵ In fashioning equitably appropriate remedies for counsel's errors at the plea stage, courts seemingly would have to consider the factors that would drive a reasonable prosecutor to offer the deal that was lost to determine which portion of the plea represented a "fair" outcome. As courts reason their way to providing remedies, they will be speculating on the amount of consideration a reasonable prosecutor, in crafting his offer, would give to various factors in the case. The reasoning of courts can then provide a starting point for negotiations between prosecutors and defense lawyers.

In the language of negotiation scholars, these decisions granting remedies provide a standard of legitimacy—a respected source weighing in on how prosecutorial discretion ought to be exercised.³⁶ Until *Lafler* and *Frye*, the Supreme Court had recognized few constitutional duties of defense counsel during plea negotiations.³⁷ More significantly, prior to these opinions, separation of powers considerations kept the judiciary from exercising any oversight over prosecutorial charging or plea bargaining decisions.³⁸ *Lafler* and *Frye* provide a

³² See Perez, *supra* note 24, at 1535.

³³ *Lafler*, 132 S. Ct. at 1389.

³⁴ *Id.*

³⁵ See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52–53 (1968).

³⁶ See Bruce Patton, *Negotiation*, in THE HANDBOOK OF DISPUTE RESOLUTION 281 (Michael L. Moffitt & Robert C. Bordone, eds., 2005).

³⁷ *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010), had required a defense lawyer to apprise his client of the immigration consequences of a plea bargain, but no other duties were recognized.

³⁸ See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Devel-*

vehicle for courts to offer standards for the appropriate exercise of prosecutorial discretion without intruding on the province of the executive branch.

The impact of these decisions is therefore potentially enormous. Scholars have long called for judicial oversight of the prosecutorial discretion but their calls for reform have been thwarted by courts' hard-wired respect for separation of powers.³⁹ By expanding the scope of defense counsel's Sixth Amendment duty, and recognizing that courts have broad equitable powers to fashion remedies, the Supreme Court has invited lower courts to indirectly develop a set of best practices in plea bargaining negotiations.

This article considers the changes *Lafley* and *Frye* will mean for defense lawyers, judges, and as a result, for prosecutors. While the greatest effects of these decisions are likely to be indirect, the Supreme Court has potentially caused a revolution in criminal procedure. Criminal defense lawyers will be forced to think about negotiation in a systematic way, as civil lawyers have done for decades. The decisions also provide judges fashioning remedies an opportunity to define the appropriate uses of prosecutorial discretion.

I. DEFENSE LAWYERS

It may seem illogical to think that granting a remedy to defendants for ineffective plea bargaining will cause defense lawyers to change. Defense lawyers have, after all, been engaging in some form of plea bargaining for centuries.⁴⁰ It

opment, 6 SETON HALL CIR. REV. 1, 2–3 (2009) (arguing that while extraordinary power of prosecutors is often explained in separation of powers terms, this is an historically inaccurate explanation).

39 See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871–73 (2009); Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 485, 493–94 (1976).

40 See generally GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003) (describing plea bargaining in early nineteenth century Massachusetts); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870–1910*, at 177 (1981) (describing a rise in rates of plea bargaining at the turn of twentieth century); MIKE McCONVILLE & CHESTER L. MIRSKY, *JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 1* (2005) (describing the rise of plea bargaining in New York City); Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211 (1979) (arguing that pleas became the primary method of disposing of criminal cases after the Civil War); Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 73 JUST. SYS. J. 338, 343–44 (1982) (describing an increase of guilty pleas from around fifty percent in the 1860s in New York, New Haven, and London to roughly ninety percent by 1900). The common wisdom is that plea bargaining was underground until the Supreme Court recognized its legitimacy in *Brady v. United States*, 397 U.S. 742 (1970). See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1045 (2006) (explaining that “plea bargaining existed as an underground and unapproved practice for most of the nation's history”). It is not clear that the practice was really underground. A year before *Brady*, a district court in West Virginia recognized that “[p]lea bargaining, in the proper sense, is a commonly used tool in efficient administration of justice, and its use in any case is not fatal per se.” *Raleigh v. Coiner*, 302 F. Supp. 1151, 1157 (D. W. Va. 1969). Further, a survey of judges in the 1950s concluded that sixty-six percent of the judges

is certainly true that only since 1970 has the Supreme Court expressly regarded guilty pleas as voluntary when they were entered into in exchange for leniency.⁴¹ As George Fisher has demonstrated, however, an underground system of plea bargaining existed long before the Supreme Court recognized the legitimacy of trading trial rights for leniency in sentencing or a reduction of the charges.⁴² Recent history is, of course, more instructive on this point. Ninety-four percent of all state criminal cases and ninety-seven percent of all federal criminal cases are resolved by guilty pleas.⁴³ Defense lawyers are thus quite accustomed to plea bargaining.

Requiring defense lawyers to meet the less-than-demanding *Strickland* standard, which requires only a minimal level of competence, while engaging in the task they most often perform may not be expected to change practice. Yet the uncomfortable role negotiation plays in a criminal defense lawyer's self-description—and the lack of academic appreciation for the skill of plea bargaining⁴⁴—made an opinion announcing a remedy for ineffective negotiation necessary to improve the quality of representation during the negotiation phase.

*A. Defense Lawyers View Themselves as Courtroom Advocates,
Not Problem-Solving Negotiators*

Lafler and *Frye*, unlike *Strickland*, will change the way defense lawyers view themselves. Despite its prominence, defense lawyers rarely see their primary job as a settlement negotiation,⁴⁵ nor do they frequently boast of their negotiation skills. White-collar criminal defense lawyers often lament that they have no opportunity to boast their greatest accomplishment—convincing

responding gave more lenient sentences to defendants who entered guilty pleas. Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 206–08 (1956).

41 See Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2017 (2000) (observing that *Brady v. United States*, 397 U.S. 742 (1970), “was the first of a landmark trilogy of Supreme Court cases enshrining plea bargaining as a valid mode of criminal adjudication.”).

42 FISHER, *supra* note 40.

43 *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

44 See Thomas F. Liotti, *Avoiding Prosecutions*, 67 N.Y. ST. B.J., Feb. 1995, at 49, 50 (observing that while there is a “paucity of literature” on prosecutorial negotiations, it “may be explained by the secretive nature of these matters, more to the point is the fact that since these backstage machinations do not have the sexy glitz of trials, they are obscured.”).

45 See Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 596 (1999) (“Many prosecutors, as well as defense lawyers, see themselves as ‘trial lawyers.’ Their role satisfaction, standing among peers and effectiveness as negotiators can all turn on their ability to believe and project their belief that they will win any case they try.”). As one scholar on negotiation has observed, “it may seem strange to apply general negotiation theory to plea bargains.” Rishi Batra, *Lafler and Frye: A New Constitutional Standard for Negotiation*, 14 CARDOZO J. CONFLICT RESOL. 309, 323 (2013). Another scholar has observed that “[i]t may seem counterintuitive to link negotiation theory and criminal procedure.” Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 118 (1997).

prosecutors not to seek indictments against their clients.⁴⁶ There are few vehicles for criminal lawyers to study the negotiating talents of great lawyers. Civil lawyers obtaining large judgments are celebrated, regardless of whether those judgments are negotiated or the result of a trial.⁴⁷ Those identified as great criminal defense lawyers are recognized for their performance in trial, or in the rare case, on appeal.⁴⁸ Those great trial lawyers often are good negotiators but their negotiation ability is rarely what brings them notoriety and certainly is not the role the public envisions when it thinks of a preeminent criminal lawyer. The public pictures Clarence Darrow examining a witness or addressing a jury, not negotiating with a prosecutor.⁴⁹

Regardless of their affinity for the task, negotiation is certainly not the work law school trained criminal defense lawyers to do.⁵⁰ For many, there is something that seems illegitimate about discussing possible settlement with prosecutors, particularly when those settlements involve some type of cooperation agreement. Some high profile defense lawyers refuse to plea bargain at all, at least when deals are contingent on cooperation.⁵¹ People questioned O.J. Simpson's choice of Robert Shapiro, noting that Shapiro's primary experience was as a negotiator,

46 See Liotti, *supra* note 44, at 49 (observing that “prosecution avoiders . . . are not necessarily famous” and “function quietly behind the scenes”).

47 For instance, the Million Dollar Advocates Forum and Multi-Million Dollar Advocates Forum limit membership to lawyers who have obtained million (or multi-million) dollar judgments for their clients, but they do not differentiate between settlements and verdict. *The Top Trial Lawyers in America*, MILLION DOLLAR ADVOCATES FORUM, <http://www.milliondollaradvocates.com> (last visited Oct. 26, 2013).

48 Alan Dershowitz seems to be one of the few lawyers who gained a popular reputation as a criminal lawyer from his appellate work. This was largely a result of his work on the Claus Von Bülow case, which became the subject of one of Dershowitz's books and was made into a popular movie. See ALAN M. DERSHOWITZ, *REVERSAL OF FORTUNE: INSIDE THE VON BÜLOW CASE* (1986).

49 A number of biographies have been written about Darrow. See, e.g., JOHN A. FARRELL, *CLARENCE DARROW: ATTORNEY FOR THE DAMNED* (2011); ANDREW E. KERSTEN, *CLARENCE DARROW: AMERICAN ICONOCLAST* (2011); IRVING STONE, *CLARENCE DARROW FOR THE DEFENSE: A BIOGRAPHY* (1941); KEVIN TIERNEY, *DARROW: A BIOGRAPHY* (1979); ARTHUR & LILA WEINBERG, *CLARENCE DARROW: A SENTIMENTAL REBEL* (1980). None of these biographies describe Darrow's plea bargaining practice.

50 See Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 74 (1995) (asking why criminal defense lawyers do not bargain effectively despite the frequency with which defense lawyers bargain). In research interviews, defense lawyers nevertheless report that they approve of the process of plea bargaining. See MILTON HEUMANN, *ADAPTING TO PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 157–62 (1978). The public at large has a very different view of the legitimacy of the practice. See Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 237–39 & nn.114–15 (2012) (citing survey research). While actors in the system may regard plea bargaining as legitimate, it is clear that defense lawyers regard it as a *less* legitimate, or prestigious, way to practice law, as the defense bar has engaged in a less concerted effort to study and improve its skills in this area than it has with other skills defense lawyers employ.

51 See Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 118–19 (1995).

not as a trial lawyer.⁵² The obvious inference was that one's skills at negotiating high-profile cases were not as impressive as trying cases, or that negotiating such cases did not demonstrate competence at presenting these issues in court. Given the strong case the State of California had against O.J. Simpson, a lawyer with a reputation as a good negotiator should have seemed like an excellent choice.⁵³

There is also an economic explanation for the reluctance of criminal lawyers to see themselves primarily as negotiators. Transactional costs play a more substantial role in evaluating the effectiveness of a civil lawyer than a criminal lawyer. In a civil case, a rational litigant is indifferent to paying \$100,000 in litigation costs as opposed to \$100,000 in a settlement.⁵⁴ In a criminal case, there is no such equivalence. Typically the only victory to be achieved in negotiation is the avoidance of more jail time. Clients rarely consider the cost of litigating a trial in deciding whether to accept a plea offer. Clients with money to pay counsel would pay virtually any legal fee imaginable to avoid jail time. But, of course, many defendants are indigent, and those that aren't generally pay flat fees.

A criminal defense lawyer who recommends his client accept a plea is thus typically making a recommendation that advances the lawyer's financial interests. The retained attorney is most often receiving a flat fee⁵⁵ for less work and the public defender whose client accepts a plea is able to move to other cases, or perhaps get a weekend off. This potential conflict between the lawyer's interest in a plea and the value to the client of a plea is often referred to as an agency cost—the lawyer's role leads him or her to have interests opposed to those of his client.⁵⁶

Maximizing a client's wealth—or minimizing his losses—is the goal of a civil lawyer, and the value of his work is judged in monetary terms. Negotiating is thus more central to the civil lawyer's role of maximizing his client's wealth,

52 See MICK BROWN, *TEARING DOWN THE WALL OF SOUND: THE RISE AND FALL OF PHIL SPECTOR* 406 (2007) ("Shapiro enjoyed a formidable reputation for smoothness and charm; he was a man who, according to [a] Los Angeles lawyer 'couldn't find his way out of a box' in trial but was widely regarded as a peerless negotiator and fixer.").

53 See, e.g., Editorial, *Unreasonable Doubt. O.J. Simpson Acquittal*, NEW REPUBLIC, Oct. 23, 1995, available at <http://business.highbeam.com/4776/article-1G1-17618819/unreasonable-doubt> (describing the strength of the prosecution's case).

54 Of course, economists and psychologists describe bounded rationality, which leads litigants to reject settlement offers that are in their economic interests. See Michael J. Kaufman, *Summary Pre-Judgment: The Supreme Court's Profound, Pervasive, and Problematic Presumption about Human Behavior*, 43 LOY. U. CHI. L.J. 593, 615 (2012) (observing that litigants will reject offers that they believe to be unfair even when they should—rationally—accept the offers).

55 Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 600 (1993) (observing that "virtually everyone advises criminal defense lawyers to get their whole fee up front, either as a flat fee for the entire representation or in the form of a retainer against which their hourly rate will be offset.").

56 See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987 (describing agency costs in criminal representation).

as a negotiated settlement consumes less of the client's wealth than a trial.⁵⁷ The financial costs of trial are very much a part of the calculation for civil litigants, while the odds of beating the prosecution's offer alone typically determine a criminal defendant's decision to go to trial or accept the offer. A public defender, or retained counsel receiving a flat fee, may shy away from embracing negotiation as her essential function because settling cases in this manner highlight one of the tensions in her representation. A settlement is typically more economically efficient for the criminal defense lawyer than trying the case.⁵⁸ The tension is less often obvious for civil lawyers, as most criminal defense lawyers do not bill hours. Lawyers billing hours—and to a lesser extent civil lawyers on contingency fees—have a stake in taking a case to trial if a better result is possible.⁵⁹ When a civil lawyer, who bills by the hour, advises a client to settle, such advice is contrary to her pecuniary interests so it does not raise the same sort of conflict of interest that could result from a typical criminal lawyer's advice to take a plea. Despite popular culture's depiction of criminal defense lawyers, most regard their duties to their clients as sacred obligations and not just a means of making a comfortable living (in fact, a good percentage of criminal defense lawyers do not live that comfortably). It may be difficult for well-intentioned defense lawyers to see their primary job description as one that highlights a tension between the lawyer's economic interest and the client's liberty interest.⁶⁰

B. Training Reinforces the Courtroom Advocate Model of Defense Lawyers

Law schools train students for litigation. The majority of courses use the case method, teaching students to view the world through the lens of litigation—appellate litigation to be precise. While law schools typically boast that they are training students to think like lawyers, they are primarily training students for

57 It is frequently assumed that there is a tension between a lawyer receiving a contingency fee and his client as the amount of work that would produce the optimal outcome for the client would not necessarily produce the optimal outcome per hour worked for the lawyer. See e.g., Bruce L. Hay, *Contingency Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996).

58 See Schulhofer, *supra* note 56, at 1988 (observing the financial incentives of public defenders and court-appointed counsel to plead cases).

59 Contingency fees in criminal cases obviously do not raise the same sorts of concerns as contingency fees in civil cases. In a civil case, a lawyer working on a contingency fee who only collects if there is a judgment in the plaintiff's favor may have a financial motive in settling too early, and may not fight hard enough for the client. In a criminal case, a contingency fee paid to a lawyer only when he obtained an acquittal would lead a lawyer to be hesitant to settle. Given the infrequency of acquittals, few lawyers would be willing to accept such a contingency fee in a criminal case. Most state ethics rules forbid contingency fees in criminal cases. For an excellent argument challenging this rule, see Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498 (1991).

60 David Abrams has suggested that defense counsel's institutional interest in maintaining a working relationship with a prosecutor may create pressure for settlement. David Abrams, *Is Pleading Really a Bargain?*, 8 J. EMPIRICAL LEGAL STUD. 200, 220 (2011).

only one aspect of lawyering: courtroom advocacy. Quite naturally, graduating law students going into litigation view their most important skill sets to be those used in a courtroom. The criminal bar organizations, which generally do an excellent job in both skills training and updating their members in statutory and case law developments, have not remedied this inaccurate self-perception. In fact, they have reinforced the adversarial model of the legal profession.

Plea bargaining is not a part of the training for defense lawyers, neither in law schools nor as part of continuing legal education courses conducted by defense lawyer organizations.⁶¹ National, state, and local organizations provide seminars covering every aspect of strategy in conducting trials and pre-trial hearings.⁶² Members of these organizations publish manuals and treatises such as *Cross Examination: Science and Techniques*⁶³ and *Pretrial Motions in Criminal Prosecutions*.⁶⁴ Last year's annual meeting of the National Association of Criminal Defense Lawyers illustrates the point. Courses were offered, for instance, on voir dire, opening and closing statements, suppressing illegally obtained evidence, and appellate advocacy.⁶⁵ Not one course was offered on negotiating with prosecutors. By contrast, civil lawyers frequently study the art of negotiation.⁶⁶

Law schools are part of this problem as well. Take a look at any major law school's curriculum. All have courses on the definition of crimes and the admissibility of the fruits of police searches and interrogations. Many have courses on the rules and procedures governing the pre-trial, trial, and post-conviction process. Classes dealing with how either prosecutors or defense lawyers should approach plea bargaining are remarkably absent from virtually

61 See Uphoff, *supra* note 50, at 75 ("[L]ittle attention has been paid to the application of general negotiation principles to the plea bargaining of criminal cases.").

62 For a sampling of these courses, see the National Association of Criminal Defense Lawyers' website. *Legal Education*, NAT'L ASS'N OF CRIM. DEF. LAWYERS, <http://www.nacdl.org/meetings/> (last visited Oct. 26, 2013).

63 LARRY S. POZNER & ROGER J. DODD, *CROSS EXAMINATION: SCIENCE AND TECHNIQUES* (2d ed. 2004).

64 JAMES A. ADAMS & DANIEL D. BLINKA, *PRETRIAL MOTIONS IN CRIMINAL PROSECUTIONS* (2d ed. 1998).

65 NAT'L ASS'N OF CRIM. DEF. LAWYERS, *supra* note 62. Similar course offerings are, in my experience, quite standard at all levels of defense organizations.

66 A number of continuing legal education programs are conducted for those engaged in civil negotiations. See e.g., Susan M. Chesler, *An Introduction to Negotiation for Future Transaction Lawyers*, BUS. LAW. TODAY (Apr. 2011), <http://apps.americanbar.org/buslaw/blt/content/2011/04/training-for-tomorrow.pdf> (describing class on contract drafting that incorporates negotiations); LEGAL PRO NEGOTIATOR, <http://legalpronegotiator.com/#sthash.cF9vRwh5.dpbs> (last visited Oct. 26, 2013) (offering online instruction on negotiating); *Negotiation Skills for Lawyers*, BRITISH LEGAL CENTRE, http://british-legal-centre.com/en/Negotiation_skills_workshop.html (last visited Oct. 26, 2013) (describing course as appropriate for lawyers and businesspeople); *Program on Negotiation*, HARV. L. SCH., <http://www.pon.harvard.edu/> (last visited Oct. 26, 2013) (offering multiple versions of negotiation courses); *Programs*, NAT'L INST. FOR TRIAL ADVOC., <http://www.nita.org/Shop#programs> (last visited Oct. 26, 2013) (describing one and two day programs).

all law school curricula. This absence is glaring given the prevalence of plea-bargaining and the very different types of arguments made in those settings. Traditional criminal law courses do not cover the considerations about the appropriateness of bringing a charge, the possibility of cooperation and how it should be valued, or how to consider equities not contemplated by statutes. All of these considerations play more prominently in most plea negotiations than the principles of statutory interpretation, or the admissibility of evidence, taught in traditional criminal law and procedure classes.

The standard set forth in *Strickland v. Washington* was not necessary to motivate lawyers to dedicate themselves to their clients at trial. This is the role they've trained for and the task they view themselves as performing. Law school trained them to view themselves as courtroom advocates and professional societies reinforced this self-image. *Strickland's* requirement that defense lawyers be minimally competent at presenting cases in a courtroom naturally did little to change the quality of representation for defendants.⁶⁷

C. The Effect of Sanctions

The threatened sanction for, or shame of, being identified as an ineffective lawyer in *Laffer* and *Frye* may be necessary to reorient the perspective of defense counsel and those who train them.⁶⁸ Very few lawyers will be found to be ineffective for applying the level of care they currently employ in negotiating criminal cases.⁶⁹ But the Supreme Court's recognition that the same type of scrutiny that applies to a lawyer's negotiation also applies to his work in trial

67 In fact, in *Strickland*, the Court observed that the Sixth Amendment's purpose was "not to improve the quality of legal representation...." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

68 See Batra, *supra* note 45, at 310 (contending that the Supreme Court "has effectively created a negotiation competency bar for criminal defense attorneys"). Contrary to what some ill-informed critics of criminal defense lawyers may say, these attorneys do not with any frequency intentionally render ineffective assistance to their clients and do want to avoid the stigma of ineffective assistance of counsel. See, e.g., Robert J. Levy, *The Dynamics of Child Sexual Abuse Prosecution: Two Florida Case Studies*, 7 J.L. & FAM. STUD. 57, 71 n.50 (2005) (observing that lawyers in a post-conviction proceeding were clearly attempting to avoid the stigma of having rendered ineffective assistance). State ethical rules recognize defense counsel's interest in avoiding such stigma and permit defense counsel to divulge information otherwise protected by attorney-client privilege, even though the defendant is not seeking damages but merely relief from a bad plea-bargain. For an excellent criticism of these rules, see Jenna C. Newmark, *The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims*, 79 FORDHAM L. REV. 699 (2010).

69 See Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, *supra* note 25, at 161–3. There will, however, be a fair number of these cases; decisions on the merits of the attorney's performance will be necessary. Unlike a claim of ineffective assistance at trial or on appeal, a claim of ineffectiveness at the plea bargaining stage necessarily involves prejudice. See discussion *supra* Part I. B. The most likely mechanism for screening these cases seems to be the requirement that a court finds that a defendant would have accepted the plea offer. The Court granted cert in *Burt v. Titlow*, a case raising the question of whether a defendant's assertion that he would have accepted the plea is sufficient. *Titlow v. Burt*, 680 F.3d 577 (6th Cir. 2012), cert. granted, 133 S. Ct. 1457 (U.S. Feb. 25, 2013) (No. 12–414).

may go a long way in changing the defense bars' view of plea bargaining. The Court announced that the work a defense lawyer does in negotiating is every bit as important—every bit as much a part of his Sixth Amendment obligation to his client—as vigorously challenging the prosecution's case in open court.⁷⁰ As the ethos of criminal defense lawyers changes and they openly recognize that a form of alternative dispute resolution is a legitimate use of their skills, they will seek to improve their ability to perform this task. Programs on negotiating with prosecutors may become as common as programs on trial advocacy. The Court's recent decision in *Padilla v. Kentucky* held that a defense lawyer is not acting competently if he fails to learn of his client's potential for deportation before entering a guilty plea, and this awakened the defense bar to the need to understand immigration law.⁷¹ Just as continuing legal education (CLE) programs began to change after *Padilla*, *Lafler* and *Frye* may lead to CLE events on negotiation tactics and certainly on the basic duties of lawyers in negotiations.

D. The Defense Bar and the Effects of Information Sharing

Clients represented by all criminal defense lawyers, whether highly compensated private lawyers or public defenders,⁷² will benefit from this change in self-perception. The criminal defense bar in most places is a very tight-knit group that frequently convenes to discuss new cases, legislation, rules, and even skills and strategies. As criminal defense practices tend to be small, there is often less of a hierarchical structure in the criminal defense bar than among lawyers who primarily engage in other practices. Senior criminal lawyers routinely mentor and share information and experience with junior

⁷⁰ See *Lafler v. Cooper*, 132 S. Ct. 1376, 1384–85 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1408–10 (2012).

⁷¹ *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). See, e.g., *Defending the Modern Drug Case: Program Agenda*, NAT'L ASS'N OF CRIM. DEF. LAWS., <http://www.nacdl.org/LegalEducation.aspx?id=19601> (last visited Aug. 30, 2013).

⁷² The institutional training provided by defense lawyer organizations is invaluable and explains why public defender offices are able to perform as well as they do with their overwhelming case loads. Public defender offices, in no small part because they are typically the largest offices practicing criminal defense in any given city, have the best in-house institutional training. Despite ill-informed discussions, mostly by non-lawyers, about the quality of public defenders, public defenders tend to be among the most talented lawyers representing criminal defendants. See Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, LAW & CONTEMP. PROBS., Winter 1995, at 81 (describing the author's own experience as a public defender). Small firms and solo practitioners are more frequently cited than others for ethical violations. See Hal R. Lieberman, *How to Avoid Common Ethics Problems*, N.Y. L.J., Oct. 28, 2002, at S4. No doubt this is related to the lack of shared experiences and institutional training in such offices. Within public defender offices there is great institutional knowledge and training, and within the defense bar generally there is a lot of shared knowledge and instruction.

lawyers. By formal and informal methods, information, tactics, and even war stories (perhaps especially war stories) travel very quickly through this relatively egalitarian group with a strong sense of shared interest.

If the members of the defense bar begin to view negotiation skills as important, as worthy of study and honing as trial skills, then defense lawyers will learn from each other how to better present their cases to the prosecutor–judges who most often determine their clients’ fates. The capital defense bar provides a solid analogy. Many believe that a concerted effort by the defense bar to understand how best to defend capital cases has contributed to the decline in death sentences.⁷³ As Jeffrey Toobin described in a recent *New Yorker* article, capital defense lawyers, with the help of anthropologists and ex-journalists, began in the mid-1980s to learn how to tell mitigation stories about defendants in a way that did not offend juries.⁷⁴ The sentencing phase of a capital case provided lawyers an opportunity to “tell the life story of the defendant in a way that explained the conduct that brought him into court.”⁷⁵ Today, those techniques are an essential part of building an effective capital defense case.⁷⁶ Many believe these efforts were prompted by a string of Supreme Court decisions holding that a defense lawyer rendered ineffective assistance if he put on an inadequate mitigation.⁷⁷

Some may argue that such an effort by the defense bar would not similarly assist attorneys in plea bargaining. Plea bargaining is certainly idiosyncratic because each prosecutor is unique and may employ any tactic he chooses in the discussion. But juries are similarly unique, and the defense bar has found it enormously helpful to train members of its profession in trial methods that have proven successful, and not just in capital cases.⁷⁸ Many criminal defense lawyers swear by the training they receive from organizations like the National Criminal Defense College, the National Association of Criminal Defense Lawyers, and various local organizations to improve their abilities.⁷⁹

In the context of plea bargaining, it is not just skills that defense lawyers could acquire from sharing information and institutional training by various bar organizations. Once these groups begin to publicly acknowledge the value of being an effective negotiator, they will likely begin to share information about

73 See Quintin Chatman, *Death Penalty Roundtable*, CHAMPION, July 2008, at 14, 15 (describing improved results from better training).

74 Jeffrey Toobin, *The Mitigator*, NEW YORKER, May 9, 2011, at 32, 32–34.

75 *Id.* at 34.

76 See Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 876 (2008).

77 Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL’Y 337, 339 (2009).

78 See Quintin Chatman, *The War Against Capital Punishment*, CHAMPION, June 2010, at 18 (“[P]articipants in [NACDL] seminar[s] regularly report of successful outcomes in their capital trials and credit the success to the training they received.”).

79 *Id.*

deals offered by various prosecutors.⁸⁰ One might suspect that defense lawyers would be competitive and not disclose the tactics that lead to the special deals they believe themselves uniquely able to acquire. This may be true in some cases, but the culture of criminal defense lawyers is typically quite collaborative.⁸¹ Defense lawyers generally have no qualms about teaching others the trial tactics that have made them successful.⁸²

As *Lafler* and *Frye* encourage defense lawyers to embrace their skills as negotiators, metrics can be developed to study the effectiveness of various lawyers so that their tactics can be replicated. Ronald Wright and Ralph Peeples have suggested that the value a particular lawyer brings to a case can be considered by looking at how the results she obtains compare to results other lawyers obtain in similar cases.⁸³ Wright and Peeples suggest that this sort of data would be valuable to organizations like public defender offices in evaluating and training lawyers.⁸⁴ As *Lafler* and *Frye* make lawyers more comfortable with their value being measured by the results they obtain in negotiations, such data collection for training purposes is likely to become more prevalent. Data sets would provide not only insight on training skills, but the data itself will also provide a baseline for typical offers, thus constraining prosecutors who want to deviate from the norm.⁸⁵

E. The Effect on Law Schools

It is not only the defense bar that is to blame for ignoring the importance of plea bargaining. Law schools have done virtually nothing to teach students how to engage in this vital role. My own story reflects the type of practice for which law school equips students. In my first month as a criminal defense lawyer in a small firm, I had a preliminary hearing in a drug case (which led to a suppression motion), three arguments in an intermediate state appellate court, an argument in a federal appeals court, and countless negotiations with prosecutors. Law school had prepared me quite well to develop the Fourth Amendment issues

⁸⁰ See Batra, *supra* note 45, at 332–33.

⁸¹ See Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV. 339, 387 (2006) (describing the generally supportive culture of criminal defense lawyers).

⁸² See Mary S. Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1095 (2006) (describing training provided by the National Criminal Defense College but noting that few public defenders have funding to attend).

⁸³ See Wright & Peeples, *supra* note 7, at 1236.

⁸⁴ *Id.* at 1223.

⁸⁵ Susan Klein has suggested that prosecutorial discretion could be constrained by requiring prosecutors to disclose the sort of deals that are standard for the crime charged. Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2028 (2006) (“To ensure accuracy and equality, federal criminal defendants and jurists need the information necessary to determine whether a prosecutor could prove guilt beyond a reasonable doubt to a jury, and the data regarding charges imposed and sentences levied against suspects alleged to have engaged in similar conduct.”).

in a suppression motion and had trained me extraordinarily well to handle the appeals. Virtually every class approximated responding to an appellate judge's questions, and my first year writing class and second year moot court simulated appellate panels.⁸⁶ Nothing, however, prepared me for the prosecutor's offer that my client plead to a misdemeanor drug offense and serve eleven months and twenty-nine days, day for day, at thirty percent for an offense charged as a B felony.⁸⁷ Tennessee's sentencing structure is confusing and law school (certainly one in a different state) could not have prepared me to understand it. It would have been a waste of the limited time in law school to learn the sentencing structure of all the neighboring states. But I was unsure of what I should have learned going into this meeting, whether this was a good offer, or what sort of information I should offer to try to improve it. I had no idea how to go about this very informal discussion that had enormous consequences for my client.

By contrast, law schools have long been educating students and practicing lawyers on how to approach civil negotiations, though these classes have surely been under-appreciated.⁸⁸ Most law students graduate without taking a class in negotiation. Nevertheless, a vast amount of research in psychology, economics, and game theory has informed academic research on negotiations, which has greatly enhanced training in negotiation.⁸⁹ Thus far, however, no one has attempted to adapt the extraordinary amount of work done to understand and teach the skill of negotiation to the unique circumstances of criminal negotiations.⁹⁰

⁸⁶ Josh Bowers described a very similar disconnect between his legal training and experience in a white-collar boutique firm and his subsequent experience in dealing with cases as a public defender in the Bronx. See Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1134 (2013).

⁸⁷ Certainly the intricacies of Tennessee sentencing law are all but impenetrable, even to those involved in the system daily. See Mark Bell, *No Standard Jail Sentence Calculations at County Level in Tennessee*, NAT'L SHERIFFS' ASS'N INST. FOR JAIL OPERATIONS (Nov. 19, 2012), <http://www.jailtraining.org/node/715>.

⁸⁸ See McAdoo, *supra* note 28, at 49.

⁸⁹ See, e.g., J. KEITH MURNINGHAN, *BARGAINING GAMES: A NEW APPROACH TO STRATEGIC THINKING IN NEGOTIATIONS* 12–13 (1993) (applying game theory to negotiation situations); Robert J. Condlin, *Legal Bargaining Theory's New "Prospecting" Agenda: It May Be Social Science, but Is It News?*, 10 PEPP. DISP. RESOL. L.J. 215, 220 n.30 (2010) (observing that "[j]ournals in social psychology, economics, organization theory, and related fields published articles on bargaining long before law journals, of course, but little of this work made its way into legal bargaining scholarship"); Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 182 (2007) ("the rich literature on biases and heuristics is a tremendous resource for those studying negotiation between a prosecutor and a defense attorney"); Deepak Malhotra & Max H. Bazerman, *Psychological Influence in Negotiation: An Introduction Long Overdue*, 34 J. MGMT. 509 (2008).

⁹⁰ One excellent example of a program of instruction on negotiation for law students and practicing lawyers alike is the Harvard Program on Negotiation. *Program on Negotiation*, HARV. L. SCH., <http://www.pon.harvard.edu/> (last visited Oct. 26, 2013). This program features practical instruction that uses the lessons learned from all of these disciplines. Their instruction focuses on Robert Mnookin's the groundbreaking work on a collaborative approach to negotiation whereby

Lafler and *Frye* should send a signal to law schools that if they are going to teach their students to function as competent counsel, they should at least provide them an introduction to plea bargaining. The Supreme Court has had more influence in developing criminal procedure curricula than it has any other topic. A look at virtually any criminal procedure casebook will illustrate this point. With one exception, these books almost exclusively contain cases from the Court. And the exception proves the rule. The early editions of Ron Wright and Marc Miller's excellent casebook on criminal procedure primarily contained state cases, though those cases incorporated federal cases in their analyses.⁹¹ The later editions responded to concerns from law teachers who wanted landmark Supreme Court cases on criminal procedure in the book.⁹² Once *Lafler* and *Frye* are included in casebooks, these important Supreme Court cases will at least prompt law professors to introduce students to the fact that they are responsible for being effective at the plea bargaining stage of the process, just as they are at the trial and appellate phases.

Unfortunately, teaching the Court's criminal procedure doctrines has not yet led to an increase in the skills associated with those doctrines. A number of Supreme Court cases have found lawyers ineffective for failure to investigate, yet with few exceptions law schools do not teach students how to investigate.⁹³ The law schools that teach *Strickland* typically do so in a second semester criminal procedure course, but only the legal standard is taught—not how to go about, or supervise, an investigation. This omission is particularly glaring given that Northwestern journalism students, not law students, discovered the facts revealing the cases of innocence on Illinois' death row.⁹⁴ Law schools, however,

parties can find value making them each better off. See ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 42–43 (2000) (observing that every negotiation has value-creating and value-distributing opportunities). This model does not work well to explain how one ought to approach a criminal negotiation in which a prosecutor can virtually always seek more stringent penalties and whose only restraint is typically internally imposed. Not surprisingly, as so little attention has been given to developing the skills involved in plea bargaining, there has been no paradigm-shifting approach to criminal negotiations that Mnookin brought to civil negotiations.

91 See MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES—PROSECUTION AND ADJUDICATION* (Richard A. Epstein et al. eds., 1st ed. 1999).

92 See MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* (Erwin Chemerinsky et al. eds., 2d ed. 2003).

93 See e.g., Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 104 (2007) (contending that the Supreme Court has imposed increasing duties on counsel to investigate). I am aware of only two courses taught on factual investigation at law schools in this country, one is at Rutgers taught by a member of the tenured faculty and the other is taught by an adjunct at the University of Arizona.

94 See Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WISC. L. REV. 1, 7 (2001); Locke E. Bowman, *Lemonade Out of Lemons: Can Wrongful Convictions Lead to Criminal Justice Reform?*, 98 J. CRIM. L. & CRIMINOLOGY 1501, 1504 (2008) (reviewing JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* (2007)).

are coming under increasing pressure to teach the skills lawyers will actually use in practice. The Court's recognition of a criminal defendant's right to an effective plea bargainer coincides with a new call for skills instruction.⁹⁵ Instruction in appellate and trial advocacy is commonplace at virtually every law school. A growing number of law schools have centers on negotiation and virtually all have classes on negotiation.⁹⁶ Often advocacy and negotiation courses are taught by adjuncts and therefore may seem not to get the attention they deserve, but these courses certainly exist at most every American law school.⁹⁷ Although negotiation courses are available, there is no doubt that an insufficient number of students take them, even though every single lawyer will need this skill in her career.⁹⁸ Criminal negotiation—plea bargaining—is taught by virtually no one and involves very different considerations than civil negotiation because of the power differential between prosecutor and defense lawyer and the prosecutor's dual advocate–judge role.⁹⁹ The well-developed models for understanding and teaching civil negotiation have not yet been adapted for criminal negotiation. Law schools can ignore skills training in plea bargaining for only so long given these pressures.

By focusing the attention of defense lawyers and those who train them on the constitutional significance of the plea bargaining process, the Supreme Court may have improved criminal representation in ways that will not be obvious from just looking at the results of post-conviction cases alleging constitutionally ineffective negotiation.

II. JUDGES

Lafler and *Frye* impose new burdens on courts hearing ineffective assistance claims. Courts will first have to determine whether a defendant has suffered ineffective assistance of counsel during the plea bargaining phase.¹⁰⁰ Many lower courts had recognized, prior to these decisions, that a defendant had a right to effective assistance of counsel at the plea bargaining phase,¹⁰¹ but the high profile of a Supreme Court decision will certainly increase the number of claims. Indigent defendants are far more likely to have heard of a ruling from the high court granting the right to effective assistance during the negotiation phase than a similar decision from an intermediate appellate court.

95 See, e.g., WILLIAM M. SULLIVAN et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 113–14 (2007).

96 See McAdoo, *supra* note 28, at 49.

97 See David Hricik, *Life in Dark Waters: A Survey of Ethical and Malpractice Issues Confronting Adjunct Law Professors*, 42 S. TEX. L. REV. 379, 382–83 (2001).

98 See McAdoo, *supra* note 28, at 49.

99 See discussion *infra* Part III.

100 See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (observing that the Court has not yet defined the duties of defense counsel in criminal negotiations).

101 See Perez, *supra* note 24, at 1539–40.

If the numbers since *Lafler* are any indication, these decisions could open up the floodgates of litigation on this issue requiring courts to develop standards defining effective assistance at this phase.¹⁰² More significantly, the Court in *Lafler* instructed lower courts to use their equitable discretion to determine what remedy to grant a defendant whose attorney unreasonably instructed him to go to trial.¹⁰³ The Court provided little guidance on how to go about fashioning such a remedy and thus gave lower courts an interesting burden and opportunity for creativity.¹⁰⁴

Courts will no doubt struggle with determining what constitutes ineffective assistance in proceedings that do not follow any formal process and leave little in the way of a paper trail to document defense counsel's performance.¹⁰⁵ Courts considering habeas corpus petitions have, however, long dealt with similar, if slightly less thorny, issues. The adequacy of a defense lawyer's investigation is frequently challenged in post-conviction proceedings.¹⁰⁶ A defense lawyer's decision not to use limited resources to pursue a particular lead is as much art as science.¹⁰⁷ No legal standards explain how to conduct an investigation. Yet, frequently courts find that attorneys have failed in their Sixth Amendment duty to investigate their client's cases.¹⁰⁸ It is at least clear what the result of a perfect investigation would look like—all the relevant information would be discovered. There is, however, no model for a perfect negotiation. In determining whether a violation of a defendant's right to effective counsel occurred at the plea stage, courts will very much be writing on a blank slate.¹⁰⁹

With recent decisions in *Lafler* and *Frye*, the Supreme Court has left lower courts with a more difficult and far more interesting question to resolve: What remedy applies when a court finds ineffective assistance of counsel? Prior to *Lafler* and *Frye*, when lower courts found a violation at this stage, they granted one of two remedies: they either ordered a new trial or they ordered the district attorney to re-offer the plea that had been rejected because of defense counsel's lapse of duty.¹¹⁰ The Supreme Court rejected these options as too rigid and

102 As of October 31, 2013, a year and a half after these decisions were issued, a Westlaw search reveals that 1,072 cases cited *Lafler*. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

103 *Id.* at 1381.

104 *See id.* at 1389 ("[T]he court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.").

105 *But see* Wright & Peeples, *supra* note 7 (observing that effectiveness of lawyers in negotiations could be evaluated by comparing results between lawyers).

106 *See* Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515 (2009) (describing the Court's recent cases involving investigation in capital cases).

107 *See* *Rompilla v. Beard*, 545 U.S. 374, 400–03 (2005) (Kennedy, J., dissenting) (observing how limited resources force strategic decisions about which investigations to conduct).

108 This occurs most often in the sentencing phase of capital cases. *See* Smith, *supra* note 106.

109 *See, e.g.,* *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) ("The art of negotiation is at least as nuanced as the art of trial") (quoting *Premo v. Moore*, 131 S.Ct. 733, 741 (2011)).

110 *See* Perez, *supra* note 24, at 1535.

instructed lower courts to use their equitable discretion to fashion a remedy for a violation.¹¹¹ In considering ineffective assistance of counsel cases with habeas corpus petitioners, the Court has repeatedly emphasized that those petitioners should only obtain relief when their convictions were somehow unfair.¹¹² It would seem to follow that lower courts fashioning remedies for defendants receiving ineffective assistance at the plea bargaining phase would have to determine what portion of the plea offer constituted a fair sentence.

A defendant claiming ineffective assistance of counsel must, of course, under *Strickland v. Washington* demonstrate that his lawyer “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”¹¹³ He must also demonstrate that he suffered prejudice as a result, which requires him to show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”¹¹⁴

After *Strickland*, the Court emphasized in *Lockhart v. Fretwell* that an analysis of prejudice that focuses only on “mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.”¹¹⁵ In *Fretwell*, the defendant’s counsel failed to object to an aggravating factor supporting his death sentence.¹¹⁶ The defendant was convicted of felony murder for a death that occurred during a robbery.¹¹⁷ His death sentence was imposed on the basis of the jury’s finding of one aggravating factor: that the crime was committed for pecuniary gain.¹¹⁸ After the defendant was sentenced but before the case was appealed, the Eighth Circuit held that an aggravating factor that duplicates an element of the offense—as it did in *Fretwell*—could not be the basis of a death sentence as the factor did not narrow the class of persons who were death eligible.¹¹⁹ The defendant therefore asserted that his attorney was constitutionally ineffective for failing to raise this claim, which would have successfully barred any subsequent effort to obtain the death penalty.¹²⁰ By the time the defendant filed his habeas claim asserting ineffective assistance of counsel, the Supreme Court held that aggravating factors duplicating elements of the offense did not violate the Eighth Amendment’s

111 See *Frye*, 132 S. Ct. at 1410–11.

112 See William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 145 (1995) (observing that “the prejudice prong of *Strickland* . . . effectively deincorporates the most fundamental right and deprives defendants of the effective assistance of counsel unless the trial in retrospect can be seen as ‘fundamentally unfair.’”).

113 *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

114 *Id.*

115 *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

116 *Id.* at 366–67.

117 *Id.*

118 *Id.* at 367.

119 *Id.*

120 *Id.*

prohibition on cruel and unusual punishment.¹²¹ Even though the results of the sentencing hearing would have been different had Fretwell's lawyer objected to the aggravating factor on appeal, the Supreme Court concluded that his death sentence "was neither unfair nor unreliable."¹²²

Strickland and its progeny therefore seem to require a court reviewing a lost opportunity to obtain a favorable plea to inquire whether the foregone plea would have yielded an unfair result. A number of courts prior to *Lafler* and *Frye* concluded that a sentence within the parameters prescribed by the statute for which a defendant was convicted could not be said to be unfair.¹²³ These courts effectively rejected any claim of ineffective assistance of counsel during the negotiation phase. The Supreme Court in *Lafler* concluded that *Fretwell* did not preclude a defendant from demonstrating prejudice as a result of defective performance in the plea bargaining phase.¹²⁴ The Court certainly did not conclude, however, that the principles of *Fretwell* had nothing to say about the remedy a defendant should receive. In fact, the Court strongly suggested that the principles of *Fretwell* have much to say about the remedy.¹²⁵ The Court concluded only that *Fretwell* did not preclude the possibility of a remedy for ineffective assistance of counsel at the plea bargaining phase.¹²⁶ Unlike the defendant in *Fretwell*, Justice Kennedy observed that the habeas petitioner in *Lafler* was not seeking to benefit from the application of an incorrect legal principle that he missed because of his lawyer's error—he was seeking to obtain the benefit he would have obtained through the plea process. The Court stated:

[The Petitioner] maintains that, absent ineffective counsel, he would have accepted a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice. The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel.¹²⁷

This part of the opinion makes the remedy seem deceptively simple. Courts must simply determine what defendants are typically offered for crimes with similar characteristics, which would actually be a fairly complicated task, but not nearly as complicated as the task Justice Kennedy ultimately assigns to lower courts.¹²⁸

121 *Id.* at 368 (citing *Lowenfeld v. Phelps*, 484 U.S. 231 (1988)).

122 *Id.* at 371.

123 *See Perez*, *supra* note 24, at 1535.

124 *Lafler v. Cooper*, 132 S. Ct. 1376, 1389 (2012).

125 *See id.* at 1387.

126 *See id.* at 1386.

127 *Id.* at 1387.

128 Susan Klein has similarly proposed that defendants in negotiations ought to be informed about the standard offer defendants receive in similar cases. *See Klein*, *supra* note 82, at 2028. Professor Stuntz further suggested that the Court in *Bordenkircher v. Hayes* should have required a similar empirical inquiry. *See Stuntz*, *Bordenkircher v. Hayes*, *supra* note 8, at 27. He suggested that the Court should have forbidden prosecutors to threaten penalties that were not at least occasionally

Remedies, Kennedy wrote, “must ‘neutralize the taint’ of a constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution.”¹²⁹ The Court did not explain how to identify plea offers, or portions of plea offers, that constituted windfalls, but did give courts great discretion to craft remedies to avoid windfalls. Once a trial court has found ineffective assistance of counsel at the plea phase, the Court instructed that the nature of the plea offer must be considered.¹³⁰ If the plea deal offered a lesser sentence than the defendant received, the trial court is to “exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.”¹³¹ If the plea offer involved a reduction in the charge, then “the proper exercise of discretion . . . may be to require the prosecution to reoffer the plea proposal.”¹³² As if that weren’t vague enough, the Court immediately added that once the plea was reoffered, “the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.”¹³³ The Court’s

given as a tactic to extract pleas. *Id.* Stuntz’s limitation would have looked to actual results as a way of cabining the practice of plea bargaining. The remedy the Court initially seemed to recommend in *Lafler* had a similar look-to-practice feel, but would instead look to bargains typically struck for such offenses under similar circumstances. Much like the scheme of remedies the Court actually created, this method of determining the remedy would have had the effect of creating a starting point in plea negotiations and may have even more quickly pushed the development of a common law of plea bargaining. For the reasons described below, it is clear that the Court did not fashion such an easily discernible approach.

129 *Lafler*, 132 S. Ct. at 1388–89 (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)).

130 *Id.* at 1389.

131 *Id.*

132 *Id.* (emphasis added).

133 *Id.* The Court required lower courts to engage in a very similar analysis in *Santobello v. New York*, 404 U.S. 257, 262–63 (1971). In *Santobello*, a defendant reached an agreement with the prosecutor’s office that he would plead guilty to the lesser of two of the charges against him and the prosecution would agree not to make a recommendation at sentencing. *Id.* at 257. By the time of sentencing, a new prosecutor was assigned to the case who was unaware of the agreement to remain silent at sentencing and recommended substantial jail time. *Id.* The Court agreed that the defendant had been denied the benefit of his bargain but, much as the Court in *Lafler*, returned the case to the state courts to determine an equitable remedy. *Id.* at 263. The Court concluded that

[t]he ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.

Id. Jenia Turner argues that remedies for Sixth Amendment violations prior to *Lafler* and *Frye* have restored defendants to the positions they would have occupied prior to the violation. She therefore criticizes the Court for allowing a less complete remedy in *Lafler*. Jenia Iontcheva Turner, *Effective Remedies for Ineffective Assistance*, 48 WAKE FOREST L. REV. 101 (2013). She is certainly correct that the Court has not previously recognized this range of remedies in an ineffective assistance

moment of greatest clarity in describing the remedy came in the following paragraph when it recognized that it was telling lower courts virtually nothing about determining remedies for defendants who had suffered from ineffective assistance at this phase. "Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion."¹³⁴

With little guidance, judges considering remedies must ask what portion of the plea offer that the defendant lost, because of ineffective assistance of counsel, would constitute a windfall to a defendant if he received it through a post-conviction proceeding. Judge Frank Easterbrook has suggested that the entire amount of leniency the defendant was offered in a plea deal would amount to a windfall if the defendant received it after the trial.¹³⁵ For Easterbrook, plea deals are about trading risks—the prosecution exchanges the risk of an acquittal for the defendant's risk of a sentence longer than the one in the plea deal. After a trial, as Easterbrook correctly observes, the prosecution has no risk of an acquittal and thus any remedy provides a windfall.¹³⁶ Prosecutors, however, make plea offers for reasons other than minimizing the risk of acquittal.¹³⁷

Justice Kennedy's opinion obviously rejected Judge Easterbrook's view that a remedy granting any kind of plea offer leniency would constitute a windfall. His opinion recognizes, though, that post-trial remedies for some portions of a plea could constitute a windfall. Unpacking which plea offers, or portions of plea offers, amount to windfalls seems to require a court to analyze why prosecutors made the offers. Prosecutors make offers for several reasons, only some of which involve attempts to achieve fair results. Judge Easterbrook's analysis only accounted for one of these reasons—risk-aversion.¹³⁸ Prosecutors agree to pursue lesser charges or shorter jail sentences than those that would result from trial for a variety of reasons, including: (1) weaknesses in the case; (2) cooperation by the defendant; (3) administrative costs to the prosecution in conducting the trial; (4) emotional toll and economic costs to the witnesses; and (5) equitable considerations not adequately accounted for by the statutory elements or sentencing guidelines.¹³⁹ Many of these considerations involve

of counsel case previously, but the Court in *Santobello* did recognize a very similar broad equitable discretion to provide a range of remedies in a case involving a plea bargain.

¹³⁴ *Laffer*, 132 S. Ct. at 1389.

¹³⁵ See Frank H. Easterbrook, *Plea Bargaining is a Shadow Market*, 51 DUQ. L. REV. 551, 556 (2013).

¹³⁶ *Id.*

¹³⁷ Elsewhere, Judge Easterbrook has recognized a variety of reasons that might drive guilty pleas and specifically suggested that a plea offer will diverge from estimates of conviction probability for notorious crimes. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 299–302 (1983).

¹³⁸ See Easterbrook, *Plea Bargaining*, *supra* note 135, at 552.

¹³⁹ See Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 35, at 53.

quid pro quo exchanges that are not possible once there has been a conviction and, more importantly, have nothing to do with the appropriateness of the defendant's sentence.

Post-trial, it would certainly amount to a windfall to grant the defendant the benefit of a trade that is no longer possible and has nothing to do with how the defendant ought to be punished. Once a case has been litigated, the prosecution has no reason to fear weaknesses in the case that will result in an acquittal; the prosecution has already spent its resources and burdened its witnesses trying the case. By the time a case reaches post-conviction proceedings, it is unlikely that a defendant could offer the prosecution anything worthwhile by providing information or testimony. Courts attempting to give defendants the "fair" outcome they were denied by rejecting the plea may well attempt to approximate the portion of the plea driven by the prosecutor's sense of the equitably proper outcome of the case. Giving the defendant the benefit of a now-unavailable quid pro quo seems like a windfall inconsistent with *Strickland's* requirement that remedies be limited to errors denying fundamental fairness.

At least one court has recognized that a defendant should not receive the benefits of a plea that were predicated on cooperation that is no longer possible. In *Burt v. Titlow*, the Sixth Circuit found that the defendant's lawyer inappropriately advised his client to go to trial rather than accept a plea offer.¹⁴⁰ The appeals court ordered the case remanded to the trial court to fashion a remedy, observing that the trial court should take into consideration the fact that the plea offer was at least partially motivated by the defendant's agreement to testify against a co-defendant.¹⁴¹ Because the co-defendant had been tried and acquitted that cooperation was no longer possible.¹⁴²

Prosecutors do, however, often make decisions that are driven, at least in part, by fairness considerations. Consider the case of *Bordenkircher v. Hayes*.¹⁴³ The defendant was charged with uttering a forged instrument—a check made out for \$88.30 that he had stolen from a Pic Pac in Lexington, Kentucky.¹⁴⁴ Under Kentucky law, this offense could have been charged as felony or a misdemeanor. The prosecutor chose to charge it as a felony, which carried a penalty between two and ten years at hard labor, but judges during this period had wide discretion

¹⁴⁰ *Titlow v. Burt*, 680 F.3d 577, 586–92 (6th Cir. 2012). The Supreme Court reversed the Sixth Circuit, finding that the lower court had not been adequately deferential to a state court finding that there was no ineffective assistance of counsel. *Burt v. Titlow*, 133 S. Ct. 1457 (U.S. Feb. 25, 2013) (No. 12–414).

¹⁴¹ *Titlow*, 680 F.3d at 92. Justice Ginsberg similarly appears to embrace the view that defendants should not be given the benefit of leniency based on cooperation even if defendants, on the advice of counsel, refuse to cooperate. In her concurrence in the Supreme Court reversal of *Burt*, Justice Ginsberg observed that there was no plea offer left to be re-offered once the defendant refused to testify against the co-defendant as the plea offer was predicated on the cooperation. *Burt*, 2013 WL 5904117, at *8.

¹⁴² *Id.* at 592.

¹⁴³ *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

¹⁴⁴ See Stuntz, *Bordenkircher v. Hayes*, *supra* note 8, at 2.

as to how sentences were to be served, so even a conviction for the felony may not have involved any jail time.¹⁴⁵ The defendant, Paul Hayes, however, had a relatively serious record. He had previously been convicted of detaining a female, which was a lesser included offense for rape, and a conviction for armed robbery.¹⁴⁶ Hayes was on probation for the armed robbery charge when he tried to cash the forged check.¹⁴⁷ The prosecutor therefore made Hayes an offer he couldn't (to be precise, should not have) refused: if Hayes pled guilty to the felony offense, with an agreed sentence of five years hard labor, the prosecution would not seek to have Hayes declared a habitual criminal, which meant a mandatory life sentence.¹⁴⁸

The prosecution could not have thought life was appropriate for this crime—even given Hayes' past—or it would have never offered five years as the alternative.¹⁴⁹ The trial in this case would have been a short one with Hayes' guilt easy to establish—his accomplice had given a statement against him, and Hayes was caught at the scene.¹⁵⁰ This was not a crime of violence, so there would have been no emotional toll on the witnesses. Hayes' accomplice had already confessed and implicated Hayes.¹⁵¹ The prosecution did not need him to convict other defendants or solve other crimes. None of the utilitarian reasons for a plea offer—risk aversion, resource preservation, minimizing witness inconvenience or discomfort, or incentivizing cooperation—could have played a prominent role in the prosecutor's decision. The prosecutor's decision seems to have been driven by his sense that five years was an appropriate sentence for a previously violent offender who returned to crime while still on probation.¹⁵² The plea offer in this case appears to have been motivated entirely by the quasi-judicial equitable task implicitly assigned to the prosecutor to determine not only what crimes had been committed, but which punishments *ought* to be sought. The Kentucky Legislature had empowered the prosecutor in Hayes' case to obtain a life sentence and doing so was not a difficult task. The decision to offer a considerably lighter sentence was apparently driven by the prosecutor's sense

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 3.

¹⁴⁹ *Id.* at 24.

¹⁵⁰ *Id.* at 5 & n.14.

¹⁵¹ Brief for Petitioner at 2, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (No. 76-1334), 1977 WL 189700 at *3.

¹⁵² The prosecutor in *Bordenkircher v. Hayes* described his decision to seek a third-strike enhancement if the defendant refused the five-year offer to be based on efficiency not equity. During his cross-examination of Paul Hayes, he asked "isn't it a fact that I told you at that time if you did not intend to save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?" *Id.* at 2-3. The discount for pleading, from life to five years, would have been an extraordinary discount to save the prosecution a very brief trial if the prosecutor found life to be an appropriate sentence.

of fairness.

As courts start to fashion remedies, they should analyze how prosecutors determined what plea bargain to offer defendants. This should reveal how much of an offer is based on a prosecutor's unspoken, equitable considerations of how a particular defendant ought to be punished. Courts could either consider how a reasonable prosecutor would have gone about arriving at the rejected offer or it could attempt to determine what motivated this individual prosecutor. If courts attempt to reconstruct the thought processes of individual prosecutors, they will create incentives for prosecutors to document their reasoning in making offers, thus preventing defendants from attempting to recast all offers as driven by fairness concerns. In recording the basis for their offers, prosecutors would look (and perhaps act) much more like the judicial actors they are in the American inquisitorial justice system.

For a variety of reasons, however, lower courts should not attempt to get inside the heads of individual prosecutors.¹⁵³ Inconsistent remedies would certainly follow from looking at the subjective thought processes of individual prosecutors, but this is the weakest objection. Every prosecutor will have idiosyncratic reasons for making a particular plea offer. Inconsistency is unavoidable in the plea bargaining process. A stronger objection is that making the subjective motivations of prosecutors relevant to the remedy for ineffective performance by defense counsel would encourage prosecutors to document the basis of their offers and discourage offers on the basis of "fairness" grounds that produce remedies. Prosecutors would have an incentive to report being motivated only by an interest in minimizing any possible remedy. Prosecutors would also view themselves as promulgating guidelines. Therefore, another objection is that guidelines promulgated by legislators or prosecutors tend to

¹⁵³ Often such efforts are referred to as attempts to examine the subjective motivations of individuals and such efforts are typically rejected because of the impossibility of the task. *See, e.g.,* *Brigham City v. Stuart*, 547 U.S. 398, 405 (2006) (stating that if basis to believe emergency entry is permitted, the officer's motivations are irrelevant); *Whren v. United States*, 517 U.S. 806, 819 (1996) (permitting traffic stop on the basis of probable cause regardless of officer's subjective motivations); *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986) (explaining that the necessity of deadly force to save one's life is viewed from standard of reasonable person). In this context of evaluating a prosecutor's motivations for offering a plea, it may actually be possible to evaluate his motivations because he may state them in making the offer. In fact, in reviewing *Batson* challenges, trial courts consider alone the subjective motivations of prosecutors. Judges observe the actors as they engage in the allegedly discriminatory selection. *Batson v. Kentucky*, 476 U.S. 79 (1986). *But see* Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1077 (2011) (observing that the method of assessing the subjective bias of lawyers in *Batson* permits lawyers to discriminate with impunity). There are, however, problems with relying on prosecutors to self-report the motivations for their plea offers when the consequences of those reports change the remedies defendant may be able to seek. In the *Batson* context, the trial judge has witnessed the entire encounter and is therefore in a good position to evaluate the advocate's veracity in offering his race-neutral justification for the peremptory strike. In the plea bargaining context, just as in the *Batson* context, prosecutors would have an incentive to mis-report, but judges would have a lesser ability to evaluate credibility because the decision-making would have occurred outside the judge's presence.

minimize the role of mitigating factors. Sentencing guidelines at the federal and state level as well as in the United States Attorney's Manual illustrate this reality.¹⁵⁴ Those promulgating rules are, for obvious reasons, institutionally disinclined to recognize large spheres of discretion. If prosecutors begin to explain the basis for their pleas, they will be disinclined to acknowledge that they regard the legislatively prescribed penalties as too harsh in certain cases.

Trial judges, however, occupy a very different institutional role than code-drafting politicians or law-enforcing prosecutors. A number of federal judges resigned because the federal sentencing guidelines limited their ability to consider the individual circumstances of an offender and his crimes.¹⁵⁵ The trial judge's perspective gives him little reason to hide the fact that a plea is driven, at least in part, by a concern that the facts of this crime do not really "fit" the crime, even though all the elements of the crime are satisfied. It is the essence of a trial judge's job to consider all of the circumstances of a defendant's crime and background and determine an appropriate sentence and do so in a methodical way on the record—or at least it was in a world before sentencing guidelines.¹⁵⁶ Trial judges ought to be adept at considering how reasonable prosecutors would view the equitable considerations in a defendant's case. It may be objected that in this case the judge would only be substituting his subjective view of the equities for the prosecutor's, but judges have in a number of contexts been asked to consider what reasonable and actual prosecutors considered. In reviewing denials of motions for pretrial diversions, judges are asked to consider what reasonable prosecutors would do.¹⁵⁷ In *Batson* challenges, judges are asked to

154 Justice Kennedy, for instance, concluded that "the compromise that led to the guidelines led also to an increase in the length of prison terms." Assoc. Justice Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) (transcript available at http://www.supremecourt.gov/publicinfo/speeches/view speeches.aspx?Filename=sp_08-09-03.html). See Joanna Shepherd, Blakely's Silver Lining: Sentencing Guidelines, Judicial Discretion and Crime, 58 HASTINGS L. J. 533, 551–52 (2007) (discussing theories of how state guidelines have produced longer sentences). The United States Attorney's Manual forbids dismissing any readily provable offense as part of a negotiation, thus creating pushing punishments toward standard, and higher, penalties. U.S. ATTORNEYS' MANUAL § 9–27.400 (2002) ("The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons."). For a defense of sentences under the federal guidelines, see Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017 (2004).

155 See Stewart Dalzell, *One Cheer for the Guidelines*, 40 VILL. L. REV. 317, 320 (1995); Hon. Stanley Sporkin, Address at the American University Law Review Dinner (Apr. 20, 1991), in 41 AM. U. L. REV. 1, 3 (1991) (describing the resignation of a United States District Judge); see also Kate Stith & José A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1254 (1997) (decrying reduction of judicial sentencing discretion).

156 *Booker v. United States*, 543 U.S. 220 (2005), of course made the sentencing guidelines advisory, but the judges who had been handing down sentences under them for years did not radically change their sentences after *Booker*. See Jeffery Ulmer & Michael T. Light, *Beyond Disparity: Changes in Federal Sentencing After Booker and Gall?*, 23 FED. SENT'G REP. 333, 340 (2011).

157 See Stanislaw Pomerski, *On Multiculturalism, Concepts of Crime and the "De Minimis" Defense*, 1997 BYU L. REV. 51, 52 (1997).

determine the actual motivations of prosecutors.¹⁵⁸ It therefore does not seem to be a stretch to ask a judge to consider how much leniency a reasonable prosecutor would have attributed to any particular factor when making the plea offer.

Courts specifically have experience in determining whether a decision was motivated by equitable considerations and giving that distinction a legal consequence. Courts look at the reason a conviction was overturned on post-conviction to determine whether the conviction will have immigration consequences. When convictions are vacated because of “procedural or substantive defects in the underlying proceeding,” those convictions may not serve as the basis for deportation.¹⁵⁹ Where, however, a sentence is “vacated because of postconviction events, such as rehabilitation or immigration hardships,” the immigration consequences of the conviction remain despite the fact that the conviction was vacated.¹⁶⁰ As one court stated it, where the vacation of the conviction is of a “purely equitable” basis or to avoid deportation, the conviction remains valid for the purposes of immigration law.¹⁶¹

More significantly, judges are permitted to reject guilty pleas as too lenient only when the judge determines that the prosecutor has given too much weight to equitable considerations calling for leniency. In the leading case on this issue, *United States v. Ammidown*, the D.C. Circuit reversed a trial judge’s refusal to accept a guilty plea, holding that in only in extreme cases could a judge make such a refusal.¹⁶² Under no condition, however, could the trial judge second-guess a plea offer motivated by concerns about how prosecutorial resources should be spent, or one based on a prosecutor’s view of the strength of the case.¹⁶³ *Ammidown* thus requires courts to determine the basis of a prosecutor’s decision to offer leniency in a plea. Courts therefore have the institutional competence to make these evaluations.

While commentators have reasonably suggested that few defendants will obtain relief under *Lafler* and *Frye*,¹⁶⁴ the number of cases reversed will not be negligible. The most commonly used basis for rejecting an ineffective assistance of counsel claim—lack of prejudice to the defendant—will not be available when a defendant claims his lawyer was ineffective in the negotiation process.

158 See Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 32–33 (1997) (observing that *Batson* calls for a judge to make a subjective determination but that the Court could have been concluding that a discriminatory impact was sufficient); Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 284 (2007). See generally *Batson v. Kentucky*, 476 U.S. 79 (1986).

159 See MARGARET COLGATE LOVE, JENNY ROBERTS & CECILIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* 134–35 (2013).

160 *Id.* at 135 (quoting *In re Pickering*, 23 I. & N. Dec. 621, 624, 2003 WL 21358480 (B.I.A. 2003)).

161 *Id.* at 135 (citing *Renteria-Gonzales v. I.N.S.*, 322 F.3d 804, 812–13 (5th Cir. 2002)).

162 *United States v. Ammidown*, 497 F.2d 615, 623 (D.C. Cir. 1973).

163 *Id.* at 621–23.

164 See Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, *supra* note 25, at 152.

The Supreme Court in *Strickland* observed that most claims could be quickly rejected by concluding that a lawyer's alleged deficiency did not prejudice the defendant; that is, the result of the trial or sentencing hearing would have been the same if the lawyer had performed as he should have.¹⁶⁵ When a defendant claims that his lawyer ineffectively represented him in the negotiation process, he is claiming that he either took a worse deal than was offered or that his lawyer could have obtained,¹⁶⁶ or that he went to trial and received a greater sentence than he was offered or should have been offered had his lawyer performed effectively.¹⁶⁷ Unlike in a trial where a reviewing court is left to speculate about the result that counsel's failure had on the verdict, no speculation will be necessary to demonstrate that the defendant was prejudiced from his counsel's unreasonable conduct during negotiations. The sentence the defendant would have received from the plea offer that was not communicated to him, or the defendant would have received had he not gone to trial, will be evident from the case records. And a defendant would only bring a post-conviction claim if those plea offers provided for a lesser sentence than he actually received.¹⁶⁸

No doubt courts will defer to many of the defense counsel decisions during the negotiation process as strategic choices, but this is true for the decisions of counsel during the trial and appeal as well. In fact, there may be fewer purely strategic choices in trials and appeals than in negotiations. The most frequent source of successful ineffective assistance of counsel claims is attorneys' failure to investigate, and these claims are most successful in the sentencing phase of capital cases where the jury can consider any mitigating factor in choosing life over death.¹⁶⁹ Plea bargaining is much like the sentencing phase of a capital case in that a prosecutor can consider anything in deciding whether to extend mercy.¹⁷⁰ Failure to investigate and present equitable arguments to prosecutors seems as problematic as a defense lawyer's failure to investigate mitigating circumstances, though sentencing consequences are regarded by most as less severe in any non-capital case.¹⁷¹ Courts will thus have a non-trivial number

165 *Strickland v. Washington*, 466 U.S. 668, 669 (1984).

166 In *Missouri v. Frye*, 132 S. Ct. 1399, 1404–05 (2012), defense counsel had actually obtained a deal better than the one the defendant ultimately accepted, but had failed to communicate the offer to the defendant.

167 See *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012).

168 David Abrams' empirical research of sentencing in Chicago suggests that there will not be that many cases in which defendants go to trial and receive jail terms longer than they were offered in plea bargains. David S. Abrams, *Is Pleading Really a Bargain?*, 8 J. EMPIRICAL L. STUD. 200 (2011). His results are counter-intuitive to virtually everyone who has worked in the criminal justice system but definitely worthy of further exploration. At least one academic has been strongly critical of his Abrams' conclusion. See Albert W. Alschuler, *Lafler and Frye: Two Small Band Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 687–91 (2013).

169 See Adam Laparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 138 (2010).

170 See *Inmates of Attica Corr. Facility v. Attica*, 477 F.2d 375 (2d Cir. 1973).

171 Justice Stewart observed in *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) that "[d]

of cases in which they are required to develop a remedy for petitioners whose attorneys were ineffective negotiators.

A remedy for ineffective assistance of counsel that permits a judge to grant a defendant only part of the leniency he would have received under the plea will certainly appeal to trial judges. It is politically difficult to reverse convictions or sentences when there is little or no doubt about the defendant's guilt and the court has spent the time trying the defendant. It certainly requires a measure of creativity to look behind the plea offer and ask what part of the plea offer was driven by quid pro quo exchanges and what part was driven by a prosecutor's sense that the offer represented a fair outcome. Trial judges tend to avoid creativity for fear of appellate reversal.¹⁷² But some principled basis will be necessary to exercise the discretion afforded lower courts to grant remedies less lenient than those contained in lost plea offers. Such creativity is consistent with *Strickland's* insistence on fairness in remedy and *Laffer's* concern that defendants not receive windfalls in post-conviction proceedings. And the development of a record at the trial court level would be helpful, if not essential, to appellate courts' fashioning a remedy based on the prosecutor's subjective determination of what punishment fits the crime. The incentives trial level courts have to minimize the impact of post-conviction remedies may well cause them to take up the opportunity to define the appropriate use of the prosecutorial function to charge and bargain.

III. PROSECUTORS

The unchecked power of prosecutors to decide which charges to bring and what plea to offer the defendant is problematic for all the reasons that led to sentencing guidelines. There is no reason to believe that prosecutors will be more consistent in their exercise of discretion than judges. In fact, there are several reasons to believe the contrary. A prosecutor has never had to explain his decision to seek certain charges and not others, or to offer or accept a plea bargain. Even in the bygone era of extraordinary judicial discretion, the sentencing hearing required an explanation of the judge's decision. There are no transparency requirements for prosecutors and thus, unlike judges, there is no system for routinely evaluating their reasoning. Prosecutorial charging and plea bargaining decisions—which can have a greater effect on a defendant's punishment than any decision made by a judge—knows virtually no limits.

eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."

172 See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 506 (Little, Brown 3d. ed. 1986); Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130 (1980); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 37 (1990).

The late Professor William Stuntz has argued that the extraordinary range of conduct criminalized by legislatures, combined with the absence of any limitation on prosecutorial charging decisions, has permitted prosecutors an unchecked power to determine who shall be punished and how much.¹⁷³

Prosecutors can determine what charges to bring, what bargains to offer, and what processes to use to determine both the appropriate charge and the appropriate plea. As described above, *Lafler* and *Frye* should encourage defense lawyers to systematically develop their skills as negotiators and provide judges an incentive to provide guidance on what the results of these negotiations should look like.

These soft-limits on prosecutorial discretion in plea bargaining are long overdue. One after another, the Supreme Court's opinions have rejected any limit on the prosecutorial prerogative, despite a host of criticism for vesting extraordinary, unchecked authority in the hands of a government official. Separation of powers concerns have prevented judicial oversight over initial charging decisions.¹⁷⁴ A healthy respect for the practice of plea bargaining has impeded any work to set limits on the gap between the initial charge and the plea offer.¹⁷⁵ Finally, liberty of contract principles have been used to justify permitting prosecutors, with defendants' consent, to circumvent procedural protections that would otherwise be available during pre-trial proceedings.¹⁷⁶

Lafler and *Frye* may empower defense counsel to impose limitations on prosecutors through the negotiation process itself, taking advantage of the very principles that have previously thwarted regulation. Should these decisions achieve this goal, they will be regarded as some of the Court's finest work, legally and politically.¹⁷⁷ Without reversing long-existing doctrines or ordering changes to established practices, circumstances in the trenches may change. A conversation about the appropriate uses of plea bargaining may well follow from the work judges are now asked to do. Outlier prosecutors, both the excessively harsh and the excessively lenient, may feel pressured to moderate their positions. A discussion about the justifications for common charging and bargaining

¹⁷³ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 537–38 (2001); see also HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* 185 (2011).

¹⁷⁴ Rachel Barkow has argued persuasively that while historical practice and constitutional text support deference to prosecutors in criminal matters, such deference is unwise. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, *supra* note 40, at 1024–28.

¹⁷⁵ Numerous legal scholars have found substantial gaps between the initial charge (or the threatened charge) and the plea offer to be problematic. See, e.g., RICHARD L. LIPPKE, *THE ETHICS OF PLEA BARGAINING* 31 (2011); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 868–70 (1995).

¹⁷⁶ See Meares, *supra* note 174, at 869–70.

¹⁷⁷ See Donald A. Dripps, *Plea Bargaining and the Supreme Court: The End of the Beginning?*, 25 FED. SENT'G REP. 141, 141–42 (2012) ("If, indeed, we ever reach a system of transparent, regulated, and accountable plea incentives, we will look back at *Padilla*, *Frye*, and *Lafler* as the cases that initiated the metamorphosis.").

practices may ensue. To understand how significant such developments would be, it is important to look at how thoroughly the Court has previously deferred to the discretion of prosecutors to charge and set the terms of negotiation.

A. Charging Decisions

Courts have repeatedly and categorically rejected the idea that they have the authority to exercise any oversight over prosecutor's charging and plea bargaining. In *Oyler v. Boles*, the Supreme Court in 1962 considered an equal protection challenge to a life sentence under West Virginia's habitual criminal act, which provided for a mandatory life sentence for the third felony, but only if the prosecutor filed an information seeking the enhanced penalty prior to sentencing.¹⁷⁸ Two defendants sentenced under this law objected that the enhancement was not sought against all defendants who were eligible for the mandatory life punishment.¹⁷⁹ One of the two defendants contended that during a fifteen-year period, there were five others in his county eligible for this enhancement—but the prosecutor sought it only in his case.¹⁸⁰ He further asserted that West Virginia prosecutors chose not to seek the enhancement against 904 other defendants.¹⁸¹

The Court concluded that “[t]he statistics merely show that according to penitentiary records a high percentage of those subject to the law have not been proceeded against.”¹⁸² Nothing, the Court concluded, showed that prosecutors were aware that the other defendants were eligible for the enhancements.¹⁸³ The Court's reasoning went much further. Even if the prosecutors had known about the prior offenses of these other defendants, respect for separation of powers prevented the Court from doing anything about it so long as the decisions to seek, or not seek, the enhancement were not based on a constitutionally protected criteria:

[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.¹⁸⁴

178 *Oyler v. Boles*, 368 U.S. 448, 449 (1962). In *Ewing v. California*, 538 U.S. 11, 28–29 (2003), the Court considered California's three-strikes law and found it constitutional. The California law, in contrast to the West Virginia law, gave a trial judge considerable discretion to determine that sentencing under the provision was inappropriate and, once the judge found the third-strike provision appropriate, required only a twenty-five year minimum. *Id.* West Virginia's law knew no such discretion and had a mandatory life penalty. *Oyler*, 368 U.S. at 449.

179 *Oyler*, 368 U.S. at 454–56.

180 *Id.* at 454–55.

181 *Id.*

182 *Id.* at 456.

183 *Id.*

184 *Id.* at 456.

Almost two decades later, the Supreme Court would again be asked to consider whether a prosecutor's charging decision violated the Constitution. In *United States v. Batchelder*, two federal statutes prohibited the receipt of a firearm by an individual with a felony conviction.¹⁸⁵ One of the statutory provisions provided for a maximum two-year penalty; the other provided for a maximum five-year penalty.¹⁸⁶ The provisions were otherwise substantively indistinguishable.¹⁸⁷ The defendant, who was sentenced under the five-year statute, therefore argued that either Congress intended the more lenient statute, which was the later-enacted statute, to be the sole punishment for possession of a firearm by a felon, or if Congress had no such intent, that giving prosecutors the option to choose between the statutes ran afoul of the Constitution.¹⁸⁸

The Court in *Batchelder* held that neither contention was true: Congress did not intend to effectively repeal the first statute with the subsequent more lenient one, nor did the Constitution forbid vesting this sort of discretion in the hands of prosecutors.¹⁸⁹ The Court found that the principle of lenity that would limit the prosecution to the less severe statute would have only applied if there were an ambiguity about whether the defendant had violated the more severe statute.¹⁹⁰ The Court held that it was clear the defendant had violated both statutes.¹⁹¹

The Seventh Circuit, when it considered *Batchelder*, concluded that the "due process and equal protection interest[s] in avoiding excessive prosecutorial discretion" limited the prosecutor to charging the defendant with the less severely punished crime.¹⁹² The Supreme Court did not share the lower court's willingness to intrude on the prosecutorial prerogative. The Court observed that

there is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context.¹⁹³

185 *United States v. Batchelder*, 442 U.S. 114, 116 (1979).

186 *Id.* at 116-17.

187 The jurisdictional elements of the two offenses were different. The offense carrying the five year maximum required the government to demonstrate that the gun possessed had traveled in interstate commerce. 18 U.S.C. § 922(h) (1970). The offense carrying the maximum two-year penalty required the government to demonstrate that the firearm was received, possessed, or transported in interstate commerce or that the defendant's possession, receipt or transportation of the gun affected interstate commerce. 18 U.S.C. § 924(a) (1970).

188 *Batchelder*, 442 U.S. at 118.

189 *Id.* at 122-23.

190 *Id.* at 121-22.

191 *Id.* at 121.

192 *Id.* at 124.

193 *Id.* at 125.

The obvious, but unstated, premise is that the Constitution imposes no limitation on a prosecutor to make a charging decision among a range of options provided by the legislature, unless, as the Court observed, that decision was based on “race, religion, or other arbitrary classification” as previously recognized in *Oyler v. Boles*.¹⁹⁴ Likely anticipating the Court’s strong respect for separation of powers, especially when dealing with prosecutors, Batchelder argued that allowing prosecutors to select among identical offenses created a problem of executive encroachment into the legislative function.¹⁹⁵ The legislature had, according to the Seventh Circuit, “impermissibly delegate[d] to the Executive Branch the Legislature’s responsibility to fix criminal penalties.”¹⁹⁶ The Court disagreed, noting that the degree of discretion the legislature conferred on prosecutors to choose among the two statutes was “no broader than the authority they routinely exercise in enforcing the criminal laws.”¹⁹⁷ Doubtlessly the Court was on solid ground with this observation. The extraordinary discretion of prosecutors to charge defendants was frequently noted.¹⁹⁸ The Court’s observation does not, however, defend the constitutionality of conferring extraordinary discretion on prosecutors; it merely illustrates that the phenomenon is widespread.

There is little impact even to the limitations on prosecutorial discretion that the Court has recognized. While other courts have recognized that charging decisions may not be made on the basis of race, religion, or other improper motives, the Supreme Court has made it very difficult to go about demonstrating that a prosecution was commenced on the basis of such an improper motive. In *United States v. Armstrong*, defendants claimed that African Americans were selected for crack cocaine prosecutions on the basis of their race.¹⁹⁹ In support of this claim, the defendant offered evidence that only African Americans in the particular district had been the subject of crack cocaine indictments despite the fact that state courts were prosecuting white defendants for this crime and treatment centers were admitting white patients for crack cocaine use.²⁰⁰ The defendants sought, on this basis, to have the United States Attorney’s Office provide the reasons why it chose to prosecute.²⁰¹ The Court found that the defendants had made an insufficient threshold showing of race-based prosecutions to justify obtaining this information.²⁰² The problem of crafting a remedy, if discriminatory prosecution had ultimately been found, undoubtedly contributed to the Court’s reluctance to permit the discovery of evidence that

194 *Id.* at 124–25; *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

195 *Batchelder*, 422 U.S. at 114.

196 *Id.* at 125.

197 *Id.* at 126.

198 *See id.* at 115, 123–26.

199 *United States v. Armstrong*, 517 U.S. 456, 459 (1996).

200 *Id.* at 459.

201 *Id.*

202 *Id.* at 458.

would have proven the claim.²⁰³ The upshot of *Armstrong* is nevertheless that the extraordinary discretion given to prosecutors practically extends to decisions potentially based on constitutionally impermissible grounds.

Courts have demonstrated the same reluctance to intervene in prosecutors' decisions to decline charges as they have prosecutors' decisions to pursue charges. In *Inmates of Attica v. Rockefeller*, guards retaking a maximum security prison following a riot allegedly used unnecessary force on captured inmates and committed unjustified killings.²⁰⁴ Surviving inmates and the families of those killed in the retaking of Attica sought to compel state and federal officials to conduct more thorough investigations than those conducted and prosecute those who had violated federal and state laws.²⁰⁵ The Second Circuit affirmed the decision of the lower court denying the requested writ of mandamus, noting that respect for the discretion of prosecutors prevented such an order.²⁰⁶ The court recognized that "[t]he primary ground upon which this traditional judicial aversion to compelling prosecutions has been based is the separation of powers doctrine."²⁰⁷ The inmates and families observed that the federal law "authorized and required" United States Attorneys "to institute prosecutions against all persons" violating the civil rights laws they alleged the Attica guards violated.²⁰⁸ The Second Circuit observed that the "required" language in the statute was not sufficiently clear to abrogate the widely recognized broad discretion of prosecutors.²⁰⁹

The Second Circuit in *Inmates of Attica* suggested that courts lacked certain institutional competence to determine which charges were appropriate.

In the absence of statutorily defined standards governing reviewability, or regulatory or statutory policies of prosecution, the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary. The reviewing courts would be placed in the undesirable and injudicious posture of becoming "superprosecutors."²¹⁰

Institutional competence does not, however, seem to be driving the reluctance of courts to review the charging decisions of prosecutors. Statutes authorizing courts to exercise some oversight over prosecutorial discretion rarely provide anything close to clarity and require the same sort of decision-making believed

203 By contrast, *Batson v. Kentucky* requires an advocate to offer a race-neutral explanation of a pre-emptory strike, but the remedy for such a violation is quite simple. See *Batson v. Kentucky*, 476 U.S. 79 (1986).

204 *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 376 (2d Cir. 1973).

205 *Id.*

206 *Id.* at 379–80.

207 *Id.* at 379.

208 *Id.* at 381. (quoting 12 U.S.C. §§ 241, 242 (2012))

209 *Id.* (citing 42 U.S.C. § 1987 (2012)) ("The mandatory nature of the word 'required' as it appears in § 1987 is insufficient to evince a broad Congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes.").

210 *Id.* at 380.

to be in the exclusive domain of prosecutors. Courts conducting proportionality review of death sentences are not looking at whether the legal criteria for the punishment are satisfied. They are asking whether the case, notwithstanding the fact the legal criteria have been satisfied, is as aggravated as cases typically yielding the penalty.²¹¹ Some states have adopted the Model Penal Code's provision permitting judges to dismiss de minimis infractions of statutes.²¹² Under this provision, a prosecution may be dismissed if the defendant's conduct is customarily tolerated, did not threaten or cause the harm contemplated by the statute, or could not reasonably be regarded as within the legislature's contemplation in passing the statute.²¹³ Finally, statutes in a number of states require prosecutors to explain their decision not to allow a defendant pre-trial diversion and permit courts to review the reasoning of prosecutors for abuse of discretion.²¹⁴

B. Lack of Substantive Limits on Plea Bargaining

The Supreme Court's first foray into plea bargaining in 1970 did no more than recognize that convictions were legitimate even though they were part of an agreement between the prosecutor and defendant to lessen the defendant's exposure to criminal penalties. The further the Court delved into cases involving plea bargaining, the more it became apparent that this process, whose very legitimacy was questioned prior to 1970, was not only permissible but knew no constitutional limits whatsoever.

It is generally assumed that plea bargaining was underground until well into the second half of the twentieth century, when the Supreme Court expressly found a plea made as part of a deal to be voluntary.²¹⁵ Given the prevalence of such bargains, however, it is hard to imagine that trial courts were unaware of

211 See David S. Baime, *Comparative Proportionality Review: The New Jersey Experience*, CRIM. L. BULL., Spring 2005, available at WestlawNext 41 No. 2 Crim. Law Bulletin ART 6 (observing that no criteria guide proportionality review); see also Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1162 (2001) (contending that "comparative proportionality review is unwarranted, methodically unsound, and theoretically incoherent").

212 As well as states that have directly adopted the MPC provisions, several more have enacted similar (but not identical) provisions. See MODEL PENAL CODE § 2.12 (2012); Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 BYU L. REV. 51, 82 (1997); Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829, 833–39 (1999).

213 MODEL PENAL CODE § 2.12 (2012). See Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 209 n.31 (1982) (describing statute).

214 See Debra T. Landis, Annotation, *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Noncriminal Alternative*, 4 A.L.R.4th 147 (1981).

215 *Brady v. United States*, 397 U.S. 742, 747–48 (1970). See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, *supra* note 40, at 1044 ("plea bargaining existed as an underground and unapproved practice for most of the nation's history"); see also discussion *supra* note 40.

the practice. A survey of federal judges in 1956 found that entry of a guilty plea was a basis for a more lenient sentence.²¹⁶ Al Alschuler observed in 1968 that plea bargaining had received remarkably good press.²¹⁷

Plea bargaining was nevertheless inconsistent with the oft-recognized rule that a plea could not be induced by a threat or promise of any kind.²¹⁸ A plea bargain, of course, is induced by just these sorts of pressures.²¹⁹ One can view the bargain as either a promise by the government not to seek the most serious conviction or severe sentence if he takes the deal—or a threat to attempt the most serious consequences for the defendant if he does not accept the offer.

Until 1970, the Supreme Court had not resolved the conflict between the requirements for a plea bargain and the reality that a number of defendants were entering pleas in exchange for the hope, if not the express promise, of leniency. With *Brady v. United States*, the Court for the first time formally recognized that a guilty plea could be voluntary even if induced by a promise of less punishment.²²⁰ Brady claimed that he pleaded guilty to avoid the death penalty.²²¹ The facts of Brady's case are unusual because the possibility of execution was not removed through a promise from the prosecution. The federal kidnapping statute under which Brady was charged was drafted in such a way that a death sentence could only follow from a jury verdict.²²² By pleading guilty, Brady escaped execution regardless of the prosecution's willingness to trade Brady's trial right for his life.²²³ As a peculiar side note to the *Brady* decision, the Court held in *United States v. Jackson*—decided two years before Brady's case—that the burden the federal kidnapping statute placed on trials was unconstitutional.²²⁴ Brady therefore alleged, to no avail, that he had pleaded guilty to avoid an unconstitutional sentence.²²⁵ The Court reasoned that while

216 See Comment, *supra* note 40, at 207.

217 See Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 35, at 51.

218 See RONALD JAY ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMAN, DEBRA A. LIVINGSTON & ANDREW D. LEIPOLD, *COMPREHENSIVE CRIMINAL PROCEDURE* 1203 (3d ed. 2011).

219 The difficulty of strictly adhering to principles of general applicability still exists today. Leniency in exchange for testimony seems to be a purchase of that testimony, yet practically prosecutors must have a way to encourage co-conspirators to testify against one another, so the law assumes there is no problem. See *United States v. Singleton*, 144 F.3d 1343, 1344–52 (10th Cir. 1998) (holding that because § 201(c)(2) states that “whoever” gives a witness anything of value for or because of his testimony has violated the statute, a plain-meaning reading of the statute must include a federal prosecutor's giving a witness a reduced sentence in exchange for his testimony), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999).

220 *Brady*, 397 U.S. at 751.

221 *Id.* at 743–44.

222 See Joseph L. Hoffman, Marcy L. Kahn & Steven W. Fisher, *Plea Bargaining in the Shadow of Death*, 69 *FORDHAM L. REV.* 2313, 2314–16 (2001) (observing the inconsistent treatment of the defendants in *Brady* and *Jackson*).

223 See *id.* at 2313–22.

224 *United States v. Jackson*, 390 U.S. 570 (1968).

225 *Brady*, 397 U.S. at 744–51.

avoidance of the death penalty may have been one of Brady's motivations, other factors may have also led to the plea, including his factual guilt.²²⁶ The Court further emphasized that the defendant was advised by an attorney who was, presumably, able to weigh the strength of the evidence that would be presented at trial and determine whether accepting the plea was in Brady's interest.²²⁷ Promises or threats were different, the Court reasoned, in the interrogation context, as suspects unaided by counsel were unable to decide whether providing information was worth the exchange offered.²²⁸

Reading *Jackson* and *Brady* side by side, one is struck by the disparate treatment the two men received. Jackson successfully filed a pre-trial motion to have the death penalty provision of the federal kidnapping statute declared unconstitutional, and tried his case with no risk of execution.²²⁹ Brady's lawyer did not file a similar pre-trial motion and Brady pleaded guilty to avoid the death penalty.²³⁰ When the death penalty provision that prompted Brady's plea was declared unconstitutional, Brady was not afforded an opportunity to go to trial or restart plea negotiations without the threat of execution.²³¹

Brady and *Jackson* also reveal something about the Court's unique deference to prosecutors. In *Jackson*, the Court concluded that the legislature is forbidden to burden a defendant's right to trial by attaching a greater penalty to a conviction resulting from a trial than one resulting from a guilty plea.²³² However, *Brady* established that the Constitution is not offended if the prosecution chooses to exchange a lesser penalty for procedural protections.²³³ Deference to prosecutorial discretion is usually defended on separation of powers principles.²³⁴ But *Jackson* denied the legislature the power to trade leniency for constitutional rights.²³⁵ *Brady* gave only prosecutors this power.²³⁶ The legislative provision at issue in *Jackson* guaranteed leniency to any defendant who waived his right to trial. Prosecutors are not required to comply with this or any neutral principle of application. They may decide for virtually any reason to exchange a lesser sentence for a waiver of trial.²³⁷

226 *Id.* at 749–50, 758.

227 *Id.* at 749, 754.

228 *Id.* at 754–55.

229 *Jackson*, 390 U.S. at 572, 591.

230 See Hoffman, Kahn & Fisher, *supra* note 221, at 2314–15.

231 *Id.* at 2314–16, 2321.

232 *Jackson* at 390 U.S. at 581–85.

233 *Brady*, 397 U.S. at 751–53.

234 See Barkow, *Separation of Powers and the Criminal Law*, *supra* note 40; see also *supra* text accompanying note 40.

235 See *Jackson*, 390 U.S. at 570–72, 581–85.

236 Cf. Barkow, *Separation of Powers and the Criminal Law*, *supra* note 40, at 1048 (observing that courts defer to prosecutors more completely than they do many other actors in the law).

237 See Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 172.

The case of *North Carolina v. Alford* forced the Court to resolve the question of whether a threatened penalty was alone a sufficient basis for a voluntary plea.²³⁸ The defendant, facing a possible death sentence, agreed to plead guilty in exchange for a thirty-year maximum sentence.²³⁹ Unlike the defendant in *Brady*, however, Alford refused to admit his guilt.²⁴⁰ Nothing other than the prosecution's threat of a death sentence explained Alford's willingness to enter this plea. The Court concluded that so long as there was a "factual basis" for the charge the prosecution brought, the plea was constitutional.²⁴¹ *Alford* thus trusted prosecutors with extraordinary discretion. Again in *Alford*, the Court observed that the defendant acted on the advice of counsel.²⁴² *Alford* not only demonstrated limited oversight of charging decisions, but also revealed that the Court required little supervision over negotiations between prosecutors and defense lawyers.

Brady and *Alford* were not without their problematic parts, but the offers themselves did not look unreasonable. *Brady*, of course, involved the threat of an unconstitutional death sentence.²⁴³ *Alford* involved a plea that, according to the terms of the defendant's plea, was motivated alone by the prosecution's threat of a death sentence. Yet, the fifty-year offer given to Brady was effectively a life sentence, and the thirty-year sentence Alford received was also a substantial period of time.²⁴⁴ If the prosecution offered a defendant facing a capital charge a plea, a very long prison sentence was the least amount of consideration that could be offered. These offers do not call into question the legitimacy of the prosecutorial decision to seek the death penalty, nor do these offers themselves raise questions about defendants' reasons for accepting them. It is somewhat hard to imagine an innocent defendant agreeing to a life sentence merely to avoid execution.

If *Brady* and *Alford* were representative of the type of plea offers prosecutors were offering in the early 1970s, then prosecutors had not, at that point, assumed the adjudicative role they have in the modern criminal justice system. Perhaps uncertainty about the constitutionality of plea bargaining kept the gap between threatened punishment and plea offers to a minimum. After the Supreme Court's recognition of the legitimacy of plea bargaining, however, it was clear that prosecutors were using their vast charging discretion to avoid trials without reducing the amount of time served.

Bordenkircher v. Hayes, discussed above, was the first case in which the Supreme Court took a look at the full brunt of the power it was authorizing with *Brady* and *Alford*. Paul Hayes forged and uttered a check he stole from a

238 *North Carolina v. Alford*, 400 U.S. 25, 28–31, 38–39 (1970).

239 *Id.* at 25.

240 *Id.* at 28.

241 *Id.* at 38.

242 *Id.* at 31.

243 *See Brady v. United States*, 397 U.S. 742 (1970).

244 *See id.* at 744; *Alford*, 400 U.S. at 28–29 (describing Alford's sentence).

Pic Pac in Lexington, Kentucky, his third felony, which meant the prosecutor could seek a mandatory life sentence.²⁴⁵ For a defendant who has no good defense to a crime, a term of any years is a good deal compared to a life sentence. By authorizing a life sentence for any third felony, the Kentucky Legislature transferred power from judges to prosecutors to determine fair sentences. Prosecutors were given the ability to make offers defendants couldn't refuse.²⁴⁶

Bordenkircher thus expressly recognized that extraordinary power would rest in the hands of prosecutors. Criminal codes defining most prohibited acts in a variety of ways, mandatory minimums, three strikes laws, and later sentencing guidelines, gave prosecutors the power to put enormous pressure on defendants to accept pleas. At least some judges after *Bordenkircher* have demonstrated discomfort with the vast powers given to prosecutors. For example, in *Newton v. Rumery*, the majority of the Supreme Court approved of a criminal defendant's waiver of liability for illegal arrest.²⁴⁷ The majority concluded, quite reasonably, that if a defendant could voluntarily waive his constitutionally guaranteed procedural protections in exchange for leniency, then he could certainly waive his right to a civil action in exchange for leniency in a criminal matter.²⁴⁸

Justice O'Connor's concurrence in *Rumery*, however, raised potential concerns about the coercive nature of an agreement like this one.²⁴⁹ She concluded that a court considering whether the waiver of liability was valid should look at a number of factors, including the criminal charge that was dismissed.²⁵⁰ As she noted, "the greater the charge, the greater the coercive effect."²⁵¹ While this point is undeniably true, its logical extension calls into question the threat of severe criminal penalties to obtain a plea involving considerably less severe sanctions—the very sort of threat brought against Paul Hayes.²⁵²

245 *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59 (1978).

246 As Albert Alschuler has nicely described the power of prosecutors to create "good deals" for defendants, when a gunman makes you an offer of "your money or your life," surrendering your money is certainly the better option, but says nothing about the legitimacy of the choice to which the victim was put. See Alschuler, Lafler and Frye, *supra* note 167, at 698.

247 *Newton v. Rumery*, 480 U.S. 386, 387 (1987).

248 *Id.* at 397–98.

249 See *id.* at 399.

250 *Id.*

251 *Id.* at 401.

252 It is interesting that Justice O'Connor raises this concern as she joined the portion of the Court's opinion comparing these agreements to plea bargaining. See *id.* at 400, 402.

C. Lack of Procedural Limits on Plea Bargaining

Just as the Supreme Court has permitted prosecutors extraordinary discretion with the substantive decisions in plea bargaining—i.e., what charges and pleas to offer—it has similarly deferred to prosecutors to define the procedures leading up to a plea. Pre-trial proceedings are heavily regulated both by statutory and constitutional limitations. As for conditions of accepting pleas, however, prosecutors appear to have all but unlimited power to require defendants to waive those pre-trial protections. In this context, there are times when the prosecution and defense interests overlap, which gives them the power to bargain around the conditions. Even if the prosecution's offer is a contract of adhesion, it may well benefit defendants. The cases nevertheless illustrate the lack of any judicial oversight of this process.

In *United States v. Mezzanatto*, the Court permitted a defendant to waive the immunity the Federal Rules of Evidence provide for plea negotiations.²⁵³ Justice Thomas noted that Federal Rule of Evidence 410 permits a defendant and his lawyer to speak candidly with the prosecutor in an effort to reach a settlement offer without fear that admissions made in this context could be used in the prosecution's case.²⁵⁴ But, as in *Mezzanatto*, a defendant can waive that protection if, in exchange for a meeting with the prosecutor, the defendant agrees to allow any statements made in that meeting to be used for impeachment purposes at trial.²⁵⁵ The reason a prosecutor would seek a waiver is obvious. Through such a mechanism, the prosecutor has not committed himself to any amount of leniency if the suspect's information is of limited use—or if his culpability turns out to be much greater than initially realized.²⁵⁶ If a deal is not struck, information learned during the negotiation process provides the prosecution valuable evidence to be used at trial. More importantly, the prosecutor's ability to use the defendant's statements from the negotiation—which will make the prosecution's case much more solid—provides an assurance that the defendant will cooperate fully and honestly. Prosecutors often have to decide quickly which suspects to cooperate with. A mechanism that ensures the reliability of the information they are obtaining from suspects allows prosecutors to make these decisions better.

The opportunity to make such a proffer also presents potential upsides for the defendant. The prosecution may well be willing to offer a better deal to defendants making blind—and admissible—waivers than they are to defendants who condition information on specific assurances.²⁵⁷ Specific deals must be

²⁵³ *United States v. Mezzanatto*, 513 U.S. 196, 209 (1995).

²⁵⁴ *Id.* at 197, 207.

²⁵⁵ *Id.* at 198.

²⁵⁶ The best known example of a deal driven purely driven by a quid pro quo exchange would be the five-year sentence given to Sammy "the Bull" Gravano, who admitted to killing nineteen people. See Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903, 956 (2011).

²⁵⁷ See Richman, *supra* note 51, at 94, 98; Eric Rasmussen, *Mezzanatto and the Economics of*

disclosed to co-defendants and almost surely will be used to undermine the credibility of cooperating witnesses. The earlier the prosecution is aware that it has a reliable cooperating conspirator, the greater the opportunity for the defendant to provide helpful information and accordingly receive a reduction in his sentence.²⁵⁸

This argument is, however, somewhat reminiscent of the liberty of contract argument made against minimum wage and maximum hour laws in the early twentieth century. Laws forbidding workers to work for less than a specified amount were said to interfere with the liberty of the *worker* to agree to work for a less money, longer hours, or in unsafe conditions.²⁵⁹ Defendants in the modern criminal justice system are permitted to waive their evidentiary privilege to inadmissible plea negotiations just as workers in the early twentieth century were permitted to work for any amount of money, regardless of what the legislature regarded the minimum wage to be. The practical reality was, of course, that in a labor-flooded market the absence of regulation permitted employers to determine salaries. Similarly, prosecutors are now able to deal only with those suspects who are willing to waive their right to discuss cooperation agreements without risk of incrimination. Permitting this waiver does not increase the options for defendants but instead shifts power to prosecutors so they may interrogate risk-averse suspects.

Surely there are checks on the amount of leniency a prosecutor will offer, but the individual defendant has no idea what sort of deal he is receiving. The prosecutor's concern that a subsequent defendant will learn of a less-than-sufficiently lenient deal and refuse to cooperate with her provides the defendant's only protection in this situation. There is a market check on a prosecutor's determination of the appropriate amount of leniency post-cooperation, but substantial pressure is placed on a defendant who has no way of knowing if market pressure will constrain this particular prosecutor.

In 2002, the Supreme Court recognized that prosecutors could effectively remove the defense counsel's involvement in their client's case. In *United States v. Ruiz*, the Court held that acceptance of a plea offer could be premised on a defendant's waiver of "the right to receive impeachment information relating to any informants or other witnesses."²⁶⁰ In *Ruiz*, the prosecution did agree to disclose "any [known] information *establishing* the factual innocence of the defendant."²⁶¹ *Ruiz* obviously raises a question about why the prosecution would

Self Regulation, 19 CARDOZO L. REV. 1541, 1583 (1998) (observing that one-sided proffer letters give defendants "the ability to guarantee the delivery of the quality" of the information offered).

258 See Benjamin A. Naftalis, "Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules, 37 COLUM. J.L. & SOC. PROBS. 1, 13 (2003) (noting that the ability of a defendant to secure leniency from the government results in a "race . . . to the swift").

259 See Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009).

260 *United States v. Ruiz*, 536 U.S. 622, 625 (2002).

261 *Id.* at 626 (emphasis added).

bring a case in which the defendant's factual innocence was "established." For those cases in which the prosecution was not in possession of such evidence (hopefully this is true for *all* the cases on a prosecutor's docket) *Ruiz* permits prosecutors to essentially eliminate the role of defense counsel that *Brady* and *Alford* regarded as crucial to a legitimate plea process. Without information about the weaknesses in the prosecution's case, defense counsel is not able to meaningfully assist his client in evaluating the likelihood of conviction because he has no way of knowing whether the deal is a good one or not. The Court has deferred to prosecutors to determine how much they will allow defense lawyers to be part of the process the state set in motion.

D. Potential for Soft Regulation of the Plea Bargaining Process

At present, prosecutors hold all of the cards in criminal negotiations, which Professor Stuntz describes as contrary to American constitutional norms and inconsistent with the rule of law.²⁶² *Lafler* and *Frye* offer the potential for soft-regulation of the plea bargaining process, or stated another way, create the potential for defense lawyers to hold a card or two as well. By encouraging courts to generate norms of prosecutorial discretion, they put pressure on prosecutors to comply with advisory guidelines. In invigorating the defense bar to concern itself with negotiation, the Court has created conditions that may allow defense counsel to better arm themselves for settlement conferences with prosecutors.

Negotiation scholars instruct parties to seek agreement on standards of legitimacy and sources that provide fair standards for valuation.²⁶³ In criminal law, the only such sources are statutes identifying maximum penalties and sentencing guidelines instructing judges once a defendant has been convicted of the offense. As Stephanos Bibas has observed, however, these values are the sticker prices for criminal conduct, not the deal that most defendants receive when they enter into agreements to plead guilty.²⁶⁴ *Lafler* and *Frye*, however, invite courts finding ineffective assistance of counsel at the plea bargaining phase to fashion sentences on the basis of fairness, which, as illustrated above, is to ask which part of the plea offer, which led to the sentence, was motivated by equitable concerns as opposed to quid pro quo exchanges. Such decisions by courts would provide non-binding guidelines for prosecutors as to how they factor fairness and leniency into their negotiations with defendants.

As described above, courts would not be required to delve into considerations of the appropriate amount of leniency attributable to every possible prosecutorial motive to determine what remedy a defendant should receive. A variety of

²⁶² See Stuntz, *Bordenkircher v. Hayes*, *supra* note 8, at 21.

²⁶³ See Patton, *supra* note 36, at 281.

²⁶⁴ See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011), *quoted in* *Lafler v. Cooper*, 132 S. Ct. 1376, 1376, 1387 (2012) (dictum).

considerations animate a prosecutor's decision to enter into a plea agreement. Equity is only one of those considerations. As described in more detail above, risk of acquittal, preservation of limited resources, emotional toll on victims and witnesses, and cooperation may all explain a prosecutor's willingness to make a deal. Courts accepting the *Lafler* and *Frye* invitation to craft remedies that reflect fair outcomes will only be required to identify the portion of the plea motivated by equitable considerations, as opposed to the portion solely motivated by quid pro quo exchanges that are no longer possible and would represent a windfall to the defendant, rather than a punishment calibrated to his degree of culpability. Consequently, courts will, at most, be identifying how reasonable prosecutors ought to consider equitable factors when making plea offers.

In assessing how a reasonable prosecutor would view the equities in a particular case, however, courts will be providing guidance to prosecutors where guidance is the most necessary. Prosecutors are the least well equipped to consider equitable factors—the circumstances of the particular offense and the defendant's unique background. As advocates, they are well equipped to understand the weaknesses in their cases. As law enforcement officers, they understand the value of information, testimony, or other assistance a cooperating defendant may be willing to offer. As administrators, they are certainly able to appreciate the resources required to conduct a jury trial. The values prosecutors place on these quid pro quo exchanges, though unregulated like all prosecutorial offers of leniency, do not raise the same concern of under-valuation that the consideration of equities raises.

This is not to say that plea offers on the basis of these quid pro quo considerations are currently without problems. Critics of plea bargaining frequently object to the weakness in the evidence as a basis for leniency.²⁶⁵ They rightly note that such offers place great pressure on defendants to forego an opportunity to demonstrate their innocence and leave the public unsure of the guilt of the person punished and the innocence of persons, known and unknown, who have gone unpunished.²⁶⁶ A trial of James Earl Ray, for instance, may have dispensed with a number of conspiracy theories that followed the assassination of Martin Luther King, Jr., as well as assured the public of Ray's guilt despite his later protests that he pleaded guilty to avoid the electric chair.²⁶⁷ Sometimes leniency offered in the face of weak evidence raises very substantial concerns about the innocence of a suspect who was made "an offer too good to refuse" in light of the threat of very serious punishment. Chinese scientist Wen Ho Lee, who was being held on espionage charges that would have led to incarceration for his natural life, accepted a plea to a felony charge that allowed

265 See Schulhofer, *supra* note 56, at 1984, 1008.

266 *Id.* at 1996.

267 See Albert W. Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV. 671, 675 n.16 (2009) (observing that Martin Luther King's son visited James Earl Ray and expressed his belief in Ray's innocence).

him to be released on time served.²⁶⁸ Lee's case, in particular, raises this concern because the conditions of his pre-trial confinement were so onerous as to have prompted a civil rights action—with the blessing of the trial judge who oversaw his criminal case—after his release.²⁶⁹

The problem with these results is that they were the product of offers of leniency, not the result of a judicial determination of guilt. The problem is not that the prosecution has assigned a low value to the possibility of innocence when making that plea offer.²⁷⁰ Ultimately, prosecutors are analyzing their own cases as litigators when they decide whether a plea offer should be made to avoid an acquittal. There are certainly advocates for eliminating plea bargaining who forcefully object to the burden it places on potentially innocent defendants to concede guilt and accept punishment.²⁷¹ There is also a tension between the judicial and advocate aspects of the prosecutor's role when considering the possibility of innocence. It is, however, very much the task of an advocate to consider the weakness in his case and determine the point at which his adversary will settle. If reduced penalties are an acceptable way for the criminal justice system to deal with weaknesses in evidence, prosecutors are probably as able as any actor in the system to determine what offer should be made to the defendant so that defendant will abandon his right to trial.

Prosecutors, however, can likely be trusted to deal fairly—perhaps even too mercifully from the public's perspective—when cooperation serves as the basis for a lenient plea offer. This may well seem ironic given the current practice of prosecutors not to make express offers to defendants before the defendants agree to provide information, act as undercover agents, or testify against co-conspirators.²⁷² However, juries are likely suspicious of essentially purchased testimony.²⁷³ Prosecutors therefore frequently agree only to consider immunity for the cooperating witness in a deal that is offered as a result of the cooperator's

268 See Matthew Purdy, *The Prosecution Unravels: The Case of Wen Ho Lee*, N.Y. TIMES (Feb. 5, 2001), <http://www.nytimes.com/2001/02/05/us/the-prosecution-unravels-the-case-of-wen-ho-lee.html>; see also Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1693 (2000).

269 See Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 5–8 (2002).

270 See generally Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73 (2009).

271 See Schulhofer, *supra* note 56, at 2004.

272 The dangers posed to cooperating witnesses have long been recognized. See, e.g., Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 7–12 (1992); Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 235–39 (1997); Richman, *supra* note 51, at 94–102.

273 See Max Minzner, *Detecting Lies Using Demeanor, Bias and Context*, 29 CARDOZO L. REV. 2557, 2573–74 (2008) (observing that the view jurors tend to have about the reliability of cooperators' testimony is completely unknown, but so is the rate at which cooperators lie).

assistance or testimony against some third party.²⁷⁴ Although the prosecutor is in the best position to know how much the cooperator has assisted the case, he is making that determination after the cooperator has nothing more to offer and has handed the prosecution all the evidence needed to convict. Allowing the prosecution to determine the amount of the reduction appropriate for cooperation seems like allowing the foxes to guard the hen house.

It turns out, however, that prosecutors offer more leniency in plea offers for cooperation than they do for virtually any other basis.²⁷⁵ A prosecutor's institutional role makes him most interested in solving crimes and obtaining convictions. While prosecutors have a quasi-judicial role, at the end of the day, prosecutors are law enforcement officers. This would explain why a prosecutor would make a relatively generous offer to obtain information but would not explain why he would be so generous once he obtained the information. It must be remembered that prosecutors are repeat players and so are the defense lawyers who represent clients with helpful information. Prosecutors who get reputations for making stingy offers after receiving substantial assistance are likely to encounter defendants willing to take their chances at trial. There is no active market for a snitch's information in the sense that competing prosecutors are offering different amounts of leniency, but there is a sort of market check on the prosecutor's pricing of information.

However, a prosecutor's exercise of equitable discretion involves an inherent conflict of interest. The advocacy half of the advocate-jurist role naturally leads a prosecutor to minimize the circumstances unique to the defendant's case that would suggest he should be treated leniently. Prosecutors consider the evidence presented to them by beat officers and detectives. They meet with victims or, in very serious cases, the families of victims. They come to understand how crime in general, and certainly the crime they are currently prosecuting, caused injury to real human beings. They do not meet with the defendant except with his attorney for the purpose of discussing a deal. For obvious reasons, the sympathetic factors about the defendant only appear on the prosecutor's radar in the bargaining process. As prosecutors prepare their cases for a potential trial, they consider how to introduce those facts that will make jurors dislike the defendant and how to minimize the impact of evidence that might make the defendant seem sympathetic. As courts crafting remedies consider how much leniency should have been attributed to concepts of fairness in particular cases, they add balance to the conversation. From a more objective viewpoint, judges are less likely to minimize equitable considerations.

If defense lawyers are able to approach negotiations with information about deals other lawyers have received and guidance from courts about the appropriate exercise of prosecutorial discretion, the negotiation process will

²⁷⁴ See Eric Rasmusen, *Mezzanatto and the Economics of Self-Crimination*, 19 CARDOZO L. REV. 1541, 1552 (1998).

²⁷⁵ See Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 12–13, 21 (2003) (describing federal practice with cooperating witnesses).

fundamentally change. Soft-regulation by the judiciary would impose legal norms into the discussion and the process of negotiation would be much more of a give-and-take. By creating the possibility of greater substantive and procedural protections for defendants, these decisions have the potential to begin plea bargaining's journey, from an essentially lawless regime toward a common law of plea bargaining.

CONCLUSION

The Court's long-standing respect for separation of powers—or more precisely, the prosecutorial prerogative—prevented direct judicial limits on America's unregulated inquisitorial system of criminal justice: plea bargaining. *Lafler* and *Frye* have created the circumstances that may allow courts and defense lawyers to have influence over a world previously dominated by unchecked agents of the executive branch.